CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **JUNE 26, 1996** **NO. 26**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, Printing and Mail Group, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 5–1996)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of May 1996 follow. The last notice was published in the CUSTOMS BULLETIN on May 29, 1996.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: June 12, 1996.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9600142	19960530	20160530	UNIRACERS (SUPER NES VERSION)	NINTENDO OF AMERICA	N
COP9600143	19960530	20160530	KIRBY'S DREAM LAND (GAME BOY VERSION	NINTENDO OF AMERICA	N
COP9600144	19960530	20160530	DONKEY KONG COUNTRY 2: DIDDY'S KONG QUEST (SUPER NES	NINTENDO OF AMERICA	N
COP9600145	19960530	20160530	KILLER INSTINCT (GAME BOY VERSION)	NINTENDO OF AMERICA	N
COP9600146	19960530	20160530	EARTHBOUND (SUPER NES VERSION)	NINTENDO OF AMERICA	N
COP9600147	19960530	20160530	TETRIS 2 (GAME BOY VERSION)	NINTENDO OF AMERICA	N
COP9600148	19960530	20160530	TETRIS 2 (SUPER NES VERSION)	NINTENDO OF AMERICA	N
COP9600149	19960530	20160530	PIZZA PARTY SKIPPER	MATTEL INC.	N
SUBTOTAL RECORDATION TYPE		8			
TMK9600321	19960501	19990811	ORANGE CRUSH	CADBURY BEVERAGES B.V.	N
TMK9600322	19960517	20021208	EYE DESIGN OF A GOLF HEAD WITH PUPIL AND CORNEAL AREAS	KARSTEN MANUFACTURING CORP.	N
TMK9600323	19960524	20051024	CULTURAL OLYMPIAD ATLANTA 1996 AND DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600324	19960524	20050905	VOLLEYBALL PLAY DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600325	19960524	20051031	IZZY AND DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600326	19960524	20050919	DIVER DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600327	19960524	20050912	LEAF AND BLOCK DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600328	19960524	20051024	ATLANTA 1996 AND DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600329	19960524	20051017	100 AND DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600330	19960524	20050905	ARCHERY FIGURE DESIGN MARK	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600331	19960523	20050516	ACOG	ATLANTA COMMITTEE FOR THE OLYMPI	Y
TMK9600332	19960524	20060313	TOOTSIE ROLL AND DESIGN	TOOTSIE ROLL INDUSTRIES INC.	N
TMK9600333	19960524	20060326	MULTI-FACETED FLUTED BOTTLE	GAETA IMPORTS INC.	Y
TMK9600334	19960524	20040503	JH LOGO	JH COLLECTIBLES INC.	Y
TMK9600335	19960524	20050418	JHC	JH COLLECTIBLES INC.	Y
TMK9600336	19960524	20051205	SAMSON AND DESIGN	SAMSON EQUIPMENT INC.	N
TMK9600337	19960524	20051014	ANNE KLEIN & LION HEAD DESIGN	ANNE KLEIN & CO., & TOLARA TRIAN	N
TMK9600338	19960524	20050729	ANNE KLEIN	ANNE KLEIN & CO., & TOLARA TRIAN	N
TMK9600339	19960524	20050815	NAVIGATA	BUGLE BOY INDUSTRIES INC.	N
TMK9600340	19960524	20020609	CRICKET BLUES	GUNTERSVILLE OUTLET INC.	Y
TMK9600341	19960524	20000102	CRICKET BY THE CREEK & DESIGN	GUNTERSVILLE OUTLET INC.	Y
TMK9600342	19960524	20030713	TRIM-MAXX	GARY R. HARLEM	N
TMK9600343	19960524	20030312	VASSARETTE	VANITY FAIR INC.	N
TMK9600344	19960524	19960605	BARBIZON	VANITY FAIR INC.	N
TMK9600345	19960524	20030615	CAPRICE	TINE PRODUCTS CORPORATION	Y
TMK9600346	19960524	20070929	RICCI ITALIAN SILVERSMITHS	GODINGER SILVER ART CO., LTD.	Y
TMK9600347	19960524	20071006	RICCI ITALIAN SILVERSMITHS	GODINGER SILVER ART CO., LTD.	N
TMK9600348	19960524	20040301	MOSCHINO	MOONSHADOW S.P.A.	N
TMK9600349	19960524	20040111	MOSCHINO	MOONSHADOW S.P.A.	N
TMK9600350	19960524	20090503	GOLD OR YELLOW COLORED RING DESIGN	LEUPOLD & STEVENS, INC.	N
TMK9600351	19960524	20090120	GOLD COLORED RING DESIGN	LEUPOLD & STEVENS, INC.	N
TMK9600352	19960524	20060130	MTR & DESIGN	MTR IMPORTS INC.	N
TMK9600353	19960524	20051010	VORTEX	LEXICON INCORPORATED	N
TMK9600354	19960524	20031123	HEALTHTEX	HEALTHTEX APPAREL CORPORATION	N
TMK9600355	19960524	20030727	PORTRAITS BY NORTHERN ISLES	KELLWOOD COMPANY	Y
TMK9600356	19960524	20050214	SIGNATURES BY NORTHERN ISLES	KELLWOOD COMPANY	Y
TMK9600357	19960524	20030913	NORTHERN ISLES & DESIGN	KELLWOOD COMPANY	Y
TMK9600358	19960524	20050801	TP-2431 BEARING GEL	TOM-PAC WESTERN PACIFIC INC.	Y

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9600359	19960524	20030713	MISCELLANEOUS DESIGN (HONEYCOMB & GINSENG ROOT)	OVERSEAS FACTOR CORP.	N
TMK9600360	19960524	20030302	HO YAN HOR CHINESE HERBAL TEA & DESIGN	OVERSEAS FACTOR CORP.	N
TMK9600361	19960524	20000807	MICELLANOUS DESIGN (DRAGON LOGO)	OVERSEAS FACTOR CORP.	N
TMK9600362	19960524	20051203	DRAGON BALM	OVERSEAS FACTOR CORP.	N
TMK9600363	19960529	20010519	HEAVEN & DESIGN	OVERSEAS FACTORS CORP.	N
TMK9600364	19960529	20000408	HEAVEN & DESIGN	OVERSEAS FACTORS CORP.	N
TMK9600365	19960529	20000408	HEAVEN & DESIGN	OVERSEA FACTOR CORP.	N
TMK9600366	19960529	20030720	SUPERIOR & DESIGN	OVERSEA FACTOR CORP.	N
TMK9600367	19960529	20051226	SAG HARBOR AND DESIGN	KELLWOOD COMPANY	N
TMK9600368	19960529	20031109	SUPER-X	PENRAY COMPANIES INC.,	N
TMK9600369	19960529	20040703	PENRAY	PENRAY COMPANIES INC.,	N
TMK9600370	19960529	20031109	SUPER-X	PENRAY COMPANIES INC.,	N
TMK9600371	19960529	20031109	SUPER-X	PENRAY COMPANIES INC.,	N
TMK9600372	19960529	19970607	SUPER-X	PENRAY COMPANIES INC.,	N
TMK9600373	19960529	20050822	STRINGED INSTRUMENT CAPO-CURVATURE OF CLAMP END	KYSER MUSICAL PRODUCTS INC.	N
TMK9600374	19960529	20010917	TULTEX MAXIMUM SHEATS & DESIGN	TULTEX CORPORTATION	N
TMK9600375	19960529	20010120	TULTEX	TULTEX CORPORTATION	N
TMK9600376	19960529	20061209	TULTEX	TULTEX CORPORTATION	N
TMK9600377	19960529	20021117	TULTEX	TULTEX CORPORTATION	N
TMK9600378	19960529	20010723	DISCUS ATHLETIC & DESIGN	TULTEX CORPORTATION	N
TMK9600379	19960529	19980117	DISCUS	TULTEX CORPORTATION	N
TMK9600380	19960529	20060106	GIFTWARE NEWS	TALCOTT PUBLISHING COMPANY INC.	N
TMK9600381	19960529	20050415	POWERARC	LINCOLN ELECTRIC CO.	N
TMK9600382	19960529	20060130	JET & DESIGN	N.V. SUMATRA TOBACCO TRADING CO.	N
TMK9600383	19960529	20040705	EL SUBLIMADO	JEAN CLAUDE MARTY	N
TMK9600384	19960529	20051031	ONE SIZE FITS MOST	SUSAN DUNN	N
TMK9600385	19960529	20050321	3DO	3DO COMPANY	N
TMK9600386	19960529	20000501	XCELITE	COOPER INDUSTRIES INC.	N
TMK9600387	19960529	20080308	PC ARC/INFO	ENVIRONMENTAL SYSTEMS RESEARCH	N
TMK9600388	19960529	20080524	ESRI	ENVIRONMENTAL SYSTEMS RESEARCH	N
TMK9600389	19960529	20080112	ARC/INFO	ENVIRONMENTAL SYSTEMS RESEARCH	N
TMK9600390	19960529	20030504	ARC VIEW	ENVIRONMENTAL SYSTEMS RESEARCH	N
TMK9600391	19960529	20030706	ARCCAD	ENVIRONMENTAL SYSTEMS RESEARCH	N
TMK9600392	19960529	20040806	SUPERIOR AND DESIGN	CHUNG INCORPORATED	N
TMK9600393	19960529	20051031	MISCELLANEOUS DESIGN (ELEUTHERO PANAX GINSENG IN	CHUNG INCORPORATED	N
TMK9600394	19960529	20030406	MISCELLANEOUS DESIGN (GUM SAN IN CHINESE CHARACTERS)	CHUNG INCORPORATED	N
TMK9600395	19960529	20000612	MISCELLANEOUS DESIGN (GOLD STRIP LABEL STYLIZED OF	CHUNG INCORPORATED	N
TMK9600397	19960529	20091107	CLIK!CASE	OUTER CIRCLE PRODUCTS LTD.	N
TMK9600398	19960529	20021222	HAELAN 851	HAELAN PRODUCTS INC.	Y
TMK9600399	19960529	20060103	BILLY JOEL	WILLIAM MARTIN JOEL	N
TMK9600400	19960529	20060107	BILLY JOEL	WILLIAM MARTIN JOEL	N
TMK9600401	19960529	20060207	INNER RIM OF LOCK NUT	MACLEAN ESNA L.P.	N
TMK9600402	19960529	20051223	BIRKENSTOCK AND DESIGN	BIRKENSTOCK ORTHOPADIE GMBH	N
TMK9600403	19960529	20060113	NOOPS	BIRKENSTOCK ORTHOPADIE GMBH	N
TMK9600404	19960529	20090124	SAMUEL ADAMS BOSTON LAGER PLUS DESIGN	BOSTON BEER COMPANY LIMITED	N
TMK9600405	19960529	20051005	BIC AND BOY DESIGN	BIC CORPORATION	N
TMK9600406	19960530	20021222	NEW YORKER	B. J. ALAN COMPANY	Y
TMK9600407	19960530	20020601	HUNTING HORN (HORN DESIGN)	EDISON BROTHERS STORES INC.	Y
TMK9600408	19960530	20090801	HUNTING HORN EXCLUSIVELY J. RIGGINGS & DESIGN	EDISON BROTHERS STORES INC.	Y

06/03/96
16:13:32

U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN MAY 1996

PAGE 3
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9600409	19960530	20071110	HUNTING HORN EXCLUSIVELY J. RIGGINGS	EDISON BROTHERS STORES INC.	Y
TMK9600410	19960530	20021201	NEW RIVER	EDISON BROTHERS STORES INC.	Y
TMK9600411	19960530	20001127	HUNTING HORN CLASSICS	EDISON BROTHERS STORES INC.	Y
TMK9600412	19960530	20050523	NEW RIVER (3 OARKS) & DESIGN	EDISON BROTHERS STORES INC.	Y
TMK9600413	19960530	20030806	WISS	COOPER INDUSTRIES	N
TMK9600414	19960530	20020911	WISS	COOPER INDUSTRIES	N
TMK9600415	19960530	20081119	WELLER	COOPER INDUSTRIES	N
TMK9600416	19960530	19980912	UTICA	COOPER INDUSTRIES	N
TMK9600417	19960530	20000411	PLUMB	COOPER INDUSTRIES	N
TMK9600418	19960530	20071031	NICHOLSON & NICHOLSON USA & DESIGN	COOPER INDUSTRIES	N
TMK9600419	19960530	20060403	NICHOLSON USA & DESIGN	COOPER INDUSTRIES	N
TMK9600420	19960530	19991220	LUFKIN	COOPER INDUSTRIES	N
TMK9600421	19960530	20091114	H. K. PORTER	COOPER INDUSTRIES	N
TMK9600422	19960530	20021129	CRESCENT	COOPER INDUSTRIES	N
TMK9600423	19960530	19970503	CAMPBELL	COOPER INDUSTRIES	N
TMK9600424	19960530	20020606	CAMPBELL	COOPER INDUSTRIES	N

SUBTOTAL RECORDATION TYPE 103

TOTAL RECORDATIONS ADDED THIS MONTH 111

PROPOSED COLLECTION; COMMENT REQUEST

APPLICATION FOR EXTENSION OF BOND FOR TEMPORARY IMPORTATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Extension of Bond for Temporary Importation. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before August 12, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Application for Extension of Bond for Temporary Importation

OMB Number: 1515–0054

Form Number: Customs Form 3173

Abstract: Imported merchandise which is to remain in the U.S. Customs territory for 1-year or less without duty payment is entered as a temporary importation. The importer may apply for an extension of this period on Customs Form 3173.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 1,155
Estimated Time Per Respondent: 10 minutes
Estimated Total Annual Burden Hours: 2,694
Estimated Total Annualized Cost on the Public: $43,100

Dated: June 3, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, June 12, 1996 (61 FR 29797)]

PROPOSED COLLECTION; COMMENT REQUEST

COMMERCIAL INVOICES

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Commercial Invoices. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before August 12, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of informa-

tion technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Commercial Invoices
OMB Number: 1515–0120
Form Number: N/A
Abstract: The collection of Commercial Invoices is necessary for the proper assessment of Customs duties. The information which is supplied by the foreign shipper is used to assure compliance with statues and regulations.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 350,000
Estimated Time Per Respondent: 10 seconds
Estimated Total Annual Burden Hours: 84,000
Estimated Total Annualized Cost on the Public: $1,201,200.00

Dated: June 3, 1996

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, June 12, 1996 (61 FR 29795)]

PROPOSED COLLECTION; COMMENT REQUEST

COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR CONTAINERS OR HOLDERS

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Country of Origin Marking Requirements for Containers or Holders. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before August 12, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Country of Origin Marking Requirements for Containers or Holders

OMB Number: 1515–0163

Form Number: N/A

Abstract: Containers or Holders imported into the United States destined for an ultimate purchaser must be marked with the English name of the country of origin at the time of importation into Customs territory.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Business or other for-profit institutions

Estimated Number of Respondents: 250

Estimated Time Per Respondent: 15 seconds

Estimated Total Annual Burden Hours: 41

Estimated Total Annualized Cost on the Public: $533.00

Dated: June 3, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, June 12, 1996 (61 FR 29796)]

PROPOSED COLLECTION; COMMENT REQUEST

CREW'S EFFECTS DECLARATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Crew's Effects Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before August 12, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Crew's Effects Declaration

OMB Number: 1515–0061

Form Number: Customs Form 1304

Abstract: Customs Form 1304 contains a list of Crew's effects that are accompanying them on the trip, which are required to be manifested, and also the statement of the master of the vessel attesting to the truthfulness of the merchandise being carried on board the vessel as Crew's effects.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 9,000
Estimated Time Per Respondent: 5 minutes
Estimated Total Annual Burden Hours: 17,168
Estimated Total Annualized Cost on the Public: $188,150

Dated: June 3, 1996

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, June 12, 1996 (61 FR 29795)]

PROPOSED COLLECTION; COMMENT REQUEST

GENERAL DECLARATION (OUTWARD/INWARD)

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the General Declaration (Outward/Inward). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before August 12, 1996, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of informa-

tion technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: General Declaration (Outward/Inward)
OMB Number: 1515–0002
Form Number: Customs Form 7507
Abstract: Customs Form 7507 allows the agent or pilot to make entry or exit of the aircraft, as required by statute. The form is used to document clearance by the arriving aircraft at the required inspectional facilities and inspections by appropriate regulatory agency staffs.
Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 500
Estimated Time Per Respondent: 5 minutes
Estimated Total Annual Burden Hours: 124,950
Estimated Total Annualized Cost on the Public: $1,874,250

Dated: June 3, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, June 12, 1996 (61 FR 29796)]

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: Notice of calculation and interest.

SUMMARY: This notice advises the public of an increase in the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning July 1, 1996, the rates will be 8 percent for overpayments and 9 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 1996.

FOR FURTHER INFORMATION CONTACT: Harry Bunn, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1252.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates effective for a quarter are determined during the first-month period of the previous quarter. The rates of interest for the fourth quarter of fiscal year (FY) 1996 (the period of July 1—September 30, 1996) are increased to 8 percent for overpayments and 9 percent for underpayments. These rates will remain in effect through September 30, 1996, and are subject to change for the first quarter of FY–1997 (the period of October 1—December 31, 1996).

Dated: June 12, 1996.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

[Published in the Federal Register, June 17, 1996 (61 FR 30667)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 101 and 122

CUSTOMS SERVICE FIELD ORGANIZATION;
ESTABLISHMENT OF SANFORD PORT OF ENTRY

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to Customs field organization by establishing a new port of entry at Sanford, Florida. The new port of entry would include Orlando-Sanford Airport, located in the city of Sanford, Seminole County, Florida, which is currently operated as a user-fee airport known as Sanford Regional Airport. This change will assist the Customs Service in its continuing efforts to achieve more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public.

DATES: Comments must be received on or before July 17, 1996.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th St., NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Harry Denning, Office of Field Operations, Resource Management Division (202) 927–0196.

SUPPLEMENTARY INFORMATION:

BACKGROUND

To achieve more efficient use of its personnel, facilities, and resources, and in order to provide better services to carriers, importers, and the public in Central Florida, Customs proposes to amend § 101.3(b)(1), Customs Regulations (19 CFR 101.3(b)(1)), by establishing a new port of entry at Sanford, Florida. The new port of entry, located in Seminole County, Florida, would include the Orlando-Sanford Airport, which currently operates as Sanford Regional Airport, and is listed in § 122.15(b) of the Customs Regulations as a user-fee airport.

Port of Entry Criteria:

No formal application procedures have been adopted for purposes of requesting new or expanded Customs services. The procedure most commonly followed has been for a recognized civic or government organization (such as a chamber of commerce, seaport or airport authority, or city government) to submit a written request to the director of the Customs port nearest where the facility is or would be located, setting forth the reason for the new or expanded service. However, there is no prohibition which prevents Customs from initiating the establishment of a port of entry where Customs has reason to believe or made a determination that the necessity for a new facility is justified. Favorable consideration of requests normally hinges on whether there is a sufficient volume of import business (actual or potential) to justify the expense of maintaining a new office or expanding service at an existing location.

The criteria considered by Customs in determining whether to establish a port of entry are found in T.D. 82–37 (47 FR 10137), as revised by T.D. 86–14 (51 FR 4559) and T.D. 87–65 (52 FR 16328). Under these criteria, which are not absolute, a community requesting a port of entry designation must:

(1) demonstrate that the benefits to be derived justify the Federal Government expense involved;
(2) be serviced by at least two major modes of transportation (rail, air, water, or highway); and
(3) have a minimum population of 300,000 within the immediate service area (approximately a 70-mile radius).

In addition, if the facility applies for designation as a port of entry based solely upon the consumption entries criterion (see below), it must make a commitment to make optimal use of electronic data transfer capabilities to permit integration with Customs Automated Commercial System (ACS), which provides a means for the electronic processing of entries of imported merchandise. Further, the actual or potential Customs workload (minimum number of transactions per year) at the proposed port of entry must meet one of several alternative minimum requirements:

(1) 15,000 international air passengers; or
(2) 2,500 formal (over $ 1,250 in Customs value) or informal (not over $ 1,250 in Customs value) consumption entries; or
(3) In the case of land border ports, 150,000 vehicles; or
(4) 2,000 scheduled international aircraft arrivals (passenger and/or cargo); or
(5) 350 cargo vessel arrivals; or
(6) Any appropriate combination of the above.

Lastly, facilities at the proposed port of entry must include cargo and passenger facilities, warehousing space for the secure storage of imported cargo pending final Customs inspection and release, and administrative office space, inspection areas, storage areas and other space necessary for regular Customs operations.

The proposal set forth in this document is based on Customs analysis of a report prepared for the Central Florida Regional Airport Board which manages the airport at Sanford and shows projected workload figures for the airport for the next decade. That report provides that although Sanford Regional Airport only became a user fee airport in 1991, since 1980 it has become the fastest growing airport for international passenger clearance services in Florida. In response to this growth, the Airport Board has elected to make substantial and long term investment in new international arrival facilities to serve this growing Central Florida market. Current flight schedules for the airport beginning in mid-April 1996 through October of this year project some 413 charter airline flights carrying approximately 118,732 international passengers.

With regard to the above criteria, Customs believes that the Federal Government would benefit from the port of entry designation because Orlando-Sanford Airport (currently operating as Sanford Regional Airport) would be available to share the workload presently handled at ports of entry such as Miami International Airport. The report further provides that State Roads 46 and 417 provide highway access to the airport, and that the population of the Seminole county-area was 287,529 in 1990 and forecast to reach 392,500 by the year 2000, which is well above the minimum 300,000 required. Further, the report provides that the Central Florida Region—comprising the surrounding counties of Lake, Volusia, Orange, Brevard, and Osceola—offered a combined additional population of 1,623,518 in 1990, forecasted to reach 2,209,957 by the year 2000. Because Sanford could qualify for port of entry status on the strength of the potential international passenger processing figures at the airport alone, and is not expected to process many consumption entries, Customs believes that the facility does not, at this time, have to make a commitment to make optimal use of electronic data transfer capabilities to permit integration with Customs Automated Commercial System (ACS), which provides a means for the electronic processing of entries of imported merchandise. Lastly, since the airport is currently a Customs user fee airport, Customs knows that office, storage, and examination space are currently available for use by Customs.

Conditional Status:

Based on the above, Customs believes that there is sufficient justification for establishment of the proposed port of entry at Sanford. If, after reviewing the public comments, Customs decides to terminate Sanford's designation as a user-fee airport, then Customs will notify the airport of that determination in accordance with the provisions of 19 CFR 122.15(c). However, it is noted that this proposal relies on potential, rather than actual, workload figures. Therefore, even if the proposed port of entry designation is adopted as a final rule, in 3 years Customs will review the actual workload generated within the new port of entry. If that review indicates that the actual workload is below the T.D. 82–37 standards, as amended, procedures may be instituted to

revoke the port of entry status. In such case, the Airport may reapply to become a user fee airport under the provisions of 19 U.S.C. 58b.

DESCRIPTION OF PROPOSED PORT OF ENTRY LIMITS

The geographical limits of the proposed Sanford port of entry would be as follows:

> The Orlando-Sanford Airport, which consists of approximately 2,000 acres which are located in Seminole County, Florida, beginning in the north/east at the intersection of State Road 46 and State Road 417 and proceeding south to Lake Mary Boulevard, turning west to Sanford Boulevard, and finally turning north to State Road 46 to the point of beginning.

PROPOSED AMENDMENTS

If the proposed port of entry designation is adopted, the list of Customs ports of entry at § 101.3(b)(1) will be amended to include Sanford as a port of entry in Florida, and Sanford Regional Airport will be deleted from the list of user-fee airports at § 122.15(b).

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 4th floor, 1099 14th St., NW, Washington, DC.

AUTHORITY

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66, and 1624.

THE REGULATORY FLEXIBILITY ACT, AND Executive Order 12866

Pursuant to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities, as the proposed amendments concern the status of only one airport facility. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: May 15, 1996.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 17, 1996 (61 FR 30552)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 96–87)

SOCIETE NOUVELLE DE ROULEMENTS (SNR), PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00520

ORDER

TSOUCALAS, *Judge:* In accordance with the order (May 9, 1996) and mandate (May 10, 1996) of the United States Court of Appeals for the Federal Circuit, Appeal No. 96–1174,

IT IS HEREBY ORDERED, ADJUDGED and DECREED: that this case is remanded to the Department of Commerce, International Trade Administration ("Commerce"), for reconsideration of its refusal to correct clerical errors allegedly contained in SNR's model identifiers and in the computer tape field identifying the bearing family in light of *NTN Bearing Corp. v. United States,* 73 F.3d 1202 (Fed. Cir. 1995); and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 96–88)

BRITISH STEEL PLC, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00550–CVD

USINAS SIDERURGICAS DE MINAS GERAIS, S.A., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00558–CVD

INLAND STEEL INDUSTRIES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00567–CVD

LTV STEEL CO., INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00568–CVD

LACLEDE STEEL CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00569–CVD

LUKENS STEEL CO., INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–09–00570–CVD

Usinor Sacilor, Sollac, GTS, and British Steel plc (collectively "plaintiffs") challenge Commerce's *Final Results of Redetermination Pursuant to Court Remand on General Issue of Allocation* (dated June 30, 1995) *(Allocation Remand)*. The *Allocation Remand* addresses the allocation methodology set forth in the *General Issues Appendix* appended to *Certain Steel Products from Austria*, 58 Fed. Reg. 37,225, 37,225–31 (Dep't Comm. 1993) (final determ.) *(General Issues Appendix)* and applied by Commerce in the final countervailing duty determinations in *Certain Steel Products from France*, 58 Fed. Reg. 37,304 (Dep't Comm. 1993) (final determ.) *(French Final Determination)* and *Certain Steel Products from the United Kingdom*, 58 Fed. Reg. 37,393 (Dep't Comm. 1993) (final determ.) *(British Final Determination)*.

Plaintiffs also challenge Commerce's *Final Results of Redetermination Pursuant to Court Remand on General Issue of Sales Denominator* (dated June 23, 1995) *(Sales Denominator Remand)*. The *Sales Denominator Remand* addresses the appropriate sales denominator employed by Commerce as set forth in the *General Issues Appendix*, 58 Fed. Reg. at 37,231–36, and as applied in the *French Final Determination* and the *British Final Determination*.

Held: Commerce's *Allocation Remand*, setting forth a method of determining the allocation period over which to allocate the benefits of nonrecurring subsidies using the company-specific average useful life of renewable physical assets and applying the allocation methodology to the *French Final Determination* and the *British Final Determination*, is sustained as based on substantial evidence and otherwise in accordance with law.

Commerce's *Sales Denominator Remand*, setting forth a rebuttable presumption that a subsidy provided by the government of the country under investigation is tied to the domestic production of the recipient where the recipient is a multinational firm whose sales include non-domestic production and applying the tying presumption to the *French Final Determination* and the *British Final Determination*, is sustained as based on substantial evidence and otherwise in accordance with law.

British Steel plc. v. United States, Consol. Court No. 93–09–00550–CVD, consisting of *British Steel plc v. United States*, Court No. 93–09–00550–CVD and *Geneva Steel, et al. v. United States*, Court No. 93–09–00572–CVD, is hereby dismissed.

(Dated June 4, 1996)

Regarding *British Steel plc v. United States*, Consol. Court No. 93–09–00550–CVD: *Steptoe & Johnson (Richard O. Cunningham, Peter Lichtenbaum)*, *(Sheldon E. Hochberg, William L. Martin, II)*, on brief, *(Richard O. Cunningham, Sheldon E. Hochberg)*, on oral argument, Counsel for British Steel plc; *Morgan, Lewis & Bockius (Mark R. Joelson), (Marcela B. Stras, Roger C. Wilson)*, on brief, Counsel for the Government of the United Kingdom, *et al.*; *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Thomas R. Howell, Martha J. Talley, John A. Ragosta, Guy C. Smith, John R. Magnus, Jeffrey D. Nuechterlein, Philip Karter, Michael R. Geroe, Jennifer Danner Riccardi)*, on brief, *(Martha J. Talley, John A. Ragosta)*, on oral argument, Counsel for Geneva Steel, *et al.*; *Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance, Barry J. Gilman)*, on brief, *(D. Scott Nance, Barry J. Gilman)*, on oral argument, Counsel for Geneva Steel, *et al.*

Regarding *Usinas Siderurgicas de Minas Gerais, S.A.*, et al. *v. United States*, Consol. Court No. 93–09–00558–CVD: *Willkie Farr & Gallagher (Christopher S. Stokes), (William H. Barringer, Nancy A. Fischer)*, on brief, *(Christopher S. Stokes)*, on oral argument, Counsel for USIMINAS; *Dickstein Shapiro & Morin (Arthur J. Lafave, III, Douglas N. Jacobson)*, Counsel for Companhia Siderurgica Nacional; *Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan), (Barry J. Gilman, D. Scott Nance)*, on brief, *(Barry J. Gilman, Scott Nance)*, on oral argument, Counsel for Gulf States Steel, Inc., *et al.; Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, John A. Ragosta, Guy C. Smith, Michael R. Geroe)*, on brief, *(John A. Ragosta)*, on oral argument, Counsel for Gulf States Steel, Inc., *et al.*

Regarding *Inland Steel Industries, Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00567–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, John R. Magnus, Jeffrey D. Nuechterlein, Jennifer Danner Riccardi)*, on brief, *(Martha J. Talley, John A. Ragosta, John R. Magnus)*, on oral argument, Counsel for Inland Steel Indus., Inc., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(Barry J. Gilman, D. Scott Nance)*, on oral argument, Counsel for Inland Steel Indus., Inc., *et al.; Weil, Gotshal & Manges LLP (Stuart M. Rosen), (M. Jean Anderson, Jeffrey P. Bialos, Diane M. McDevitt, Scott Maberry;* and *Stuart M. Rosen, Mark F. Friedman, Jonathan Bloom)*, on brief, *(M. Jean Anderson, Stuart M. Rosen)*, on oral argument, Counsel for Usinor Sacilor, Sollac and GTS.

Regarding *LTV Steel Co., Inc.*, et al. *v. United States*, Consol. Court No. 93–09–00568–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Guy C. Smith, O. Julia Weller, Kristen M. Neller, Michael R. Geroe)*, on brief, *(John A. Ragosta, Guy C. Smith)*, on oral argument, Counsel for LTV Steel Co., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(D. Scott Nance)*, on oral argument, Counsel for LTV Steel Co., *et al.; Sharretts, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins)*, Counsel for Thyssen Stahl AG, *et al.; LeBoeuf, Lamb, Greene & MacRae, L.L.P. (Pierre F. de Ravel d'Esclapon, Mary Patricia Michel)*, Counsel for AG der Dillinger Hüttenwerke; *Hogan & Hartson (Lewis E. Leibowitz, Steven J. Routh, Paul Minorini)*, Counsel for Fried, Krupp AG Hoesch-Krupp, *et al.*

Regarding *Laclede Steel Co.*, et al. *v. United States*, Consol. Court No. 93–09–00569–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Linda C. Menghetti, Jeffrey D. Nuechterlein, Jennifer Danner Riccardi)*, on brief, *(John A. Ragosta, Jeffrey D. Nuechterlein, Jennifer Danner Riccardi)*, on oral argument, Counsel for Laclede Steel Co., *et al.* Armco Steel Co., *et al.* and Bethlehem Steel Corp., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(D. Scott Nance)*, on oral argument, Counsel for Laclede Steel Co., *et al.*, Armco Steel Co., *et al.*, and Bethlehem Steel Corp., *et al.; Morrison & Foerster (Donald B. Cameron), (Julie C. Mendoza, Craig A. Lewis, Sue-Lynn Koo, Panagiotis C. Bayz)*, on brief, *(Donald B. Cameron, Julie C. Mendoza)*, on oral argument, Counsel for Dongbu Steel Co., *et al.*

Regarding *Lukens Steel Co.*, et al. *v. United States*, Consol. Court No. 93–09–00570–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Guy C. Smith, Scott L. Forseth, Michael R. Geroe)*, on brief, *(John A. Ragosta)*, on oral argument, Counsel for Lukens Steel Co., *et al.; Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer), (D. Scott Nance)*, on brief, *(D. Scott Nance)*, on oral argument, Counsel for Lukens Steel Co., *et al.; Shearman & Sterling (Jeffrey M. Winton), (Robert E. Herzstein, Shavit Matias)*, on brief, Counsel for Altos Hornos de Mexico, S.A. de C.V.

Regarding *Geneva Steel*, et al. *v. United States*, Consol. Court No. 93–09–00566–CVD: *Dewey Ballantine (Michael H. Stein), (Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Michael R. Geroe)*, on brief, *(Martha J. Talley, Michael R. Geroe)*, on oral argument, Counsel for Geneva Steel, *et al.; Barnes, Richardson & Colburn (Gunter von Conrad)*, Counsel for Fabrique de Fer Charleroi, S.A.; *LeBoeuf, Lamb, Greene & MacRae (Melvin S. Schwechter)*, Counsel for S.A. Forgess de Clabecq; *O'Melveny & Myers (Peggy A. Clarke, Gary N. Horlick)*, Counsel for Sidmar N.V. and TradeARBED, Inc.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(A. David Lafer); Stephen J. Powell, (Terrence J. McCartin, Robert E. Nielsen, David W. Richardson, Elizabeth C. Seastrum, Marguerite Trossevin),* on brief, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, Counsel for defendant.

OPINION

CARMAN, *Judge:* The following actions were consolidated by order of the Court of International Trade (Court or CIT) dated February 4, 1994: *British Steel plc v. United States,* Court No. 93–09–00550–CVD and *Geneva Steel,* et al. *v. United States,* Court No. 93–09–00572–CVD consolidated as *British Steel plc v. United States,* Consol. Court No. 93–09–00550–CVD; *Usinas Siderurgicas de Minas Gerais, S.A. v. United States,* Court No. 93–09–00558–CVD, *Gulf States Steel, Inc. of Alabama,* et al. *v. United States,* Court No. 93–09–00574–CVD, and *Usinas Siderurgicas de Minas Gerais, S.A. v. United States,* Court No. 93–09–00578–CVD consolidated as *Usinas Siderurgicas de Minas Gerais, S.A. v. United States,* Consol. Court No. 93–09–00558–CVD; *Inland Steel Industries, Inc.,* et al. *v. United States,* Court No. 93–09–00567–CVD, *Usinor Sacilor,* et al. *v. United States,* Court No. 93–09–00588–CVD, *Usinor Sacilor,* et al. *v. United States,* Court No. 93–09–00589–CVD, *Usinor Sacilor,* et al. *v. United States,* Court No. 93–09–00590–CVD, and *Usinor Sacilor,* et al. *v. United States,* Court No. 93–09–00591–CVD consolidated as *Inland Steel Industries, Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00567–CVD; *LTV Steel Co., Inc.,* et al. *v. United States,* Court No. 93–09–00568–CVD, *Thyssen Stahl AG,* et al. *v. United States,* Court No. 93–09–00585–CVD, *AG der Dillinger Hüttenwerke v. United States,* Court No. 93–09–00596–CVD, and *Fried. Krupp AG Hoesch-Krupp and Krupp Hoesch Stahl AG v. United States,* Court No. 93–09–00603–CVD consolidated as *LTV Steel Co., Inc.,* et al. *v. United States,* Consol. Court No. 93–09–00568–CVD; *Laclede Steel Co.,* et al. *v. United States,* Court No. 93–09–00569–CVD, *Pohang Iron & Steel Co., Ltd. v. United States,* Court No. 93–09–00579–CVD, *Dongbu Steel Co. Ltd.,* et al. *v. United States,* Court No. 93–09–00580–CVD, *Dongbu Steel Co. Ltd.,* et al. *v. United States,* Court No. 93–09–00581–CVD, and *Pohang Iron & Steel Co., Ltd. v. United States,* Court No. 93–09–00582–CVD consolidated as *Laclede Steel Co.,* et al. *v. United States,* Consol. Court No. 93–09–00569–CVD; *Lukens Steel Co.,* et al. *v. United States,* Court No. 93–09–00570–CVD, *Altos Hornos de Mexico, S.A. de C.V. v. United States,* Court No. 93–09–00618–CVD, and *Industrias Monterrey S.A. de C.V. v. United States,* Court No. 93–09–00632–CVD consolidated as *Lukens Steel Co.,* et al. *v. United States,* Consol. Court No. 93–09–00570–CVD;[1] and *Geneva Steel,* et al. *v. United States,* Court No. 93–09–00566–CVD and *Fabrique de Fer de Charleroi v. United States,* Court No.

[1] *Industrias Monterrey S.A. de C.V. v. United States,* Court No. 93–09–00632–CVD, was consolidated under *Lukens Steel Co., et al. v. United States,* Consol. Court No. 93–09–00570–CVD, by order of this Court on December 9, 1994.

93–09–00599–CVD, consolidated as *Geneva Steel*, et al. *v. United States*, Consol. Court No. 93–09–00566–CVD.[2]

After several scheduling conferences and upon review and consideration of the minutes of the December 15, 1993, scheduling conference and upon agreement of all parties and pursuant to U.S. CIT R. 42(a), the Court entered the scheduling order governing the joint proceeding in the above-captioned cases. As a convenience to the parties, the Court used *British Steel plc v. United States*, Consol. Court No. 93–09–00550–CVD to identify this joint proceeding and to establish the guidelines set forth in the February 18, 1994, scheduling order. In accordance with that order, the parties were jointly ordered to brief five general issues which were divided into two groups. General Issues—Group One pertains to: (a) the Department of Commerce's (Department or Commerce) use of a fifteen-year allocation period to determine the benefit from several nonrecurring countervailable grants; (b) Commerce's use of a grant methodology to countervail equity infusions into an unequityworthy company whose shares are not publicly traded; and (c) Commerce's treatment of privatization and restructuring regarding previously received subsidies, including the Department's use of a repayment methodology. General Issues—Group Two pertains to: (a) Commerce's determination of the appropriate sales denominator to be used in subsidy calculations when a respondent's total sales include not only sales of domestically produced merchandise, but also sales of merchandise produced in one or more foreign countries; and (b) Commerce's treatment of disproportionality for the purpose of evaluating the specificity of a potentially countervailable program. The Scheduling Order directed all questions of law and issues of fact regarding the five general issues to be briefed solely in the context of the briefs on these issues. All parties were prohibited from re-briefing or re-arguing any of these questions or issues in the context of the briefs on the country-specific issues. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1988).

STANDARD OF REVIEW

The appropriate standard for the Court's review of a remand determination by Commerce is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

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[2] The Court notes that *Empresa Nacional Siderurgica, S.A. v. United States*, Court No. 93–09–00625–CVD, was also a part of this joint proceeding. *See British Steel plc v. United States*, Consol. Court No. 93–09–00550–CVD at 11 (CIT Feb. 18, 1994) (scheduling order). The Court further notes that the parties represented in *Empresa Nacional Siderurgica, S.A. v. United States*, Court No. 93–09–00625–CVD, filed a voluntarily stipulated dismissal pursuant to which that action was dismissed on January 25, 1995.

SECTION ONE: ALLOCATION

On the general issue of the allocation methodology, Usinor Sacilor, Sollac, GTS, and British Steel plc (collectively "plaintiffs") filed a joint motion for partial judgment on the agency record pursuant to U.S. CIT R. 56.2 and for an order declaring that aspect of the *General Issues Appendix* appended to *Certain Steel Products from Austria*, 58 Fed. Reg. 37,225, 37,225–31 (Dep't Comm. 1993) (final determ.) (*General Issues Appendix*) pertaining to the allocation methodology employed by Commerce as set forth in the *General Issues Appendix* and applied in the final countervailing duty determinations in *Certain Steel Products from France*, 58 Fed. Reg. 37,304 (Dep't Comm. 1993) (final determ.) (*French Final Determination*)[3] and *Certain Steel Products from the United Kingdom*, 58 Fed. Reg. 37,393 (Dep't Comm. 1993) (final determ.) (*British Final Determination*)[4] to be unsupported by substantial evidence on the record and not otherwise in accordance with law. Commerce opposed plaintiffs' motion, as did AK Steel Corporation, Bethlehem Steel Corporation, Geneva Steel, Gulf States Steel Incorporated of Alabama, Inland Steel Industries, Incorporated, Laclede Steel Company, LTV Steel Company, Incorporated, Lukens Steel Company, National Steel Corporation, Sharon Steel Corporation, U.S. Steel Group a unit of USX Corporation, and WCI Steel, Incorporated (collectively "Domestic Producers").

On February 9, 1995, this Court issued an opinion addressing all five general issues. *See British Steel plc v. United States*, 879 F. Supp. 1254 (CIT 1995) (*British Steel*). On the general issue of the allocation methodology, this Court held: (1) Commerce failed to allocate the benefits of the subsidies received by the firms under investigation in a manner reflecting the actual "commercial and competitive benefit" of the subsidies to the companies and thus the determinations conflicted with Congress' clearly expressed intent; (2) Commerce's use of a 15-year allocation period based solely on the U.S. Internal Revenue Service's Class Life Asset Depreciation Range System[5] (IRS tax tables) was unsupported by substantial evidence on the record and was not otherwise in accordance with law; and (3) the allocation methodology as set forth in the *General Issues Appendix* was unlawful. *See id.* at 1298. Accordingly, the Court remanded the *French Final Determination* and the *British Final Determination* to Commerce. The Court directed Commerce to reexamine the allocation methodology as employed in both final determinations for a case by case examination of the relevant commercial and competitive factors of the firms under investigation occasioned by receipt of the subsidies at issue. After having examined such factors, Commerce was to determine if those factors, when examined with or without a proxy such as the IRS tax tables, led to a method of

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[3] Commerce amended the *French Final Determination* on August 17, 1993. *See Certain Steel Products from France*, 58 Fed. Reg. 43,759 (Dep't Comm. 1993) (order and am. final determ.).

[4] Commerce amended the *British Final Determination* on August 17, 1993. *See Certain Steel Products from the United Kingdom*, 58 Fed. Reg. 43,748 (Dep't Comm. 1993) (order and am. final determ.).

[5] Rev. Proc. 77–10, 1977–1 C.B. 548, *superseded by* Rev. Proc. 83–35, 1983–1 C.B. 745, *made obsolete by* Rev. Proc. 87–56, 1987–2 C.B. 674.

allocating the benefits of nonrecurring subsidies that reasonably reflected the commercial and competitive advantages enjoyed by the firms receiving such subsides.[6]

This part of the opinion addresses Commerce's *Final Results of Redetermination Pursuant to Court Remand on General Issue of Allocation* (dated June 30, 1995) (*Allocation Remand*).

BACKGROUND

A. *The Allocation Methodology:*

As explained in *British Steel*, in allocating the economic benefits of nonrecurring subsidies, Commerce apportions the value of the subsidies over a number of years beginning with the year of receipt. The countervailing duty (CVD) statute is silent, however, as to the methodology to be employed in allocating subsidy benefits. Since 1982, Commerce's practice has been to allocate benefits from nonrecurring subsidies, such as grants and equity, over the average useful life (AUL) of renewable physical assets as set out in the IRS tax tables. Because the IRS tax tables set the AUL of renewable assets in the steel industry at 15 years, Commerce established an allocation period of 15 years for the subsidy benefits in the *French Final Determination* and the *British Final Determination*.

B. *The Allocation Remand:*

1. The Average Useful Life Methodology:

Commerce determined the AUL methodology to be the most reasonable allocation methodology complying with the Court's instructions in *British Steel*. To explain its use of AUL to determine the appropriate time period over which to allocate subsidy benefits, Commerce notes two basic accounting principles: (1) the principle that the "actual duration of the commercial or competitive benefit associated with a grant or equity infusion is almost always indeterminate"; and (2) the recognition "that the exact nature of the expenditure of the grant or equity funds * * * is not relevant to the question of commercial and competitive benefit." *Allocation Remand* at 6. Notwithstanding the difficulties raised by these principles, Commerce continues, the agency is charged with basing its choice of a reasonable time period on the "commercial and competitive factors for the firms under investigation." *Id.* at 7. Of these factors, Commerce isolates production as the essential factor: "[T]he competitive position of any company ultimately depends upon its productive activity; without production, there are no other commercial and competitive factors that are relevant for a manufacturing enterprise." *Id.* This finding is in accord with the CVD statute, Commerce states, because the "statute focuses on benefits to *production* of the subject merchandise." *Id.* (citing 19 U.S.C. § 1303(a)(1) (1988) (providing that a

[6] In the case of the *British Final Determination*, however, Commerce's carrying out of the allocation remand instructions in *British Steel* was conditioned upon Commerce first finding parties in the *British Final Determination* liable for countervailing duties. Commerce subsequently found British Steel plc liable for countervailing duties in the remand on the general issue of privatization, which finding this Court has upheld. *See British Steel plc v. United States*, Slip Op. 96–60 at 117 (CIT Apr. 2, 1996).

duty equal to the net amount of a bounty or grant shall be paid on "any bounty or grant upon the manufacture or production or export" of the subject merchandise)). "A company's renewable physical assets," Commerce explains, "are reasonably related to the productive activity of a firm in that the renewable physical assets are absolutely essential to production; and renewable physical assets have a determinable average useful life. The AUL has competitive significance because the renewal of physical assets is essential to production." *Id.* Commerce recognizes that other factors relate to a company's production other than physical assets, such as employees, land, buildings, and raw materials, but notes that

> with the exception of land and buildings, only physical assets (capital equipment and machines) have an identity which cannot be separated from the firm because capital assets are owned and controlled by the firm; they are the substance within the corporate form. As such, they comprise the core element of a company's productive activities and thus bear a measurable relationship to the duration of subsidy benefits.

Id. at 39. "Unlike land or equity which have an indeterminate life," Commerce continues, "physical assets have a useful life which can serve as a reasonable measure of the duration of benefits provided to a firm from nonrecurring subsidies." *Id.*

Commerce considered alternative methodologies proposed by the parties, but in the end found that "AUL is the most reasonable method of deriving the allocation period for nonrecurring subsidies; it reasonably reflects the commercial and competitive advantages enjoyed by the firms under investigation." *Id.* at 20. "[T]he AUL of the renewable physical assets employed by a company provides a reasonable approximation of the duration of the commercial and competitive benefits to that company for all non-recurring subsidies," Commerce reasons, as subsidy "benefits extend as long as the average useful life of the company's assets." *Id.* at 7.[7]

2. Company-Specific AUL Calculations:

After determining AUL was the most reasonable methodology for deriving an allocation period, Commerce applied the methodology to the companies under investigation to derive a company-specific AUL for each respondent. To make the company-specific AUL calculations, Commerce requested that Usinor Sacilor, Sollac, and GTS (collectively "Usinor Sacilor"), respondents in the *French Final Determination*, and British Steel plc (BS plc), a respondent in the *British Final Determination*, provide the AUL of their assets as well as "any national standards concerning the average useful life of assets in France and in the United Kingdom." *Id.* at 17. Both Usinor Sacilor and BS plc provided AUL cal-

[7] Commerce cites the General Agreement on Tariffs and Trade (GATT) guidelines, which provide that the allocation period over which to allocate subsidy benefits "should be based on reasonable and generally accepted financial and accounting principles such as the average life of assets owned by the firm." *Allocation Remand* at 6 (citing *Guidelines on Amortization and Depreciation*, GATT Doc. SCM/64 (Apr. 25, 1985), *reprinted in Basic Instruments and Selected Documents* 154 (32nd Supp. 1986)).

the exported good on its subsequent importation into Canada or Mexico). Paragraph (b)(1) of section 181.45 provides that:

> For purposes of this subpart, a reference to a good in the "same condition" includes a good that has been subjected to any of the following operations provided that no such operation materially alters the characteristics of the good:
>
> (i) Mere dilution with water or another substance;
> (ii) cleaning, including removal of rust, grease, paint or other coatings;
> (iii) Application of preservative, including lubricants, protective encapsulation, or preservation paint;
> (iv) Trimming, filing, slitting or cutting;
> (v) Putting up in measured doses, or packing, repacking, packaging or repackaging; or
> (vi) Testing, marking, labeling, sorting or grading.

In ruling HQ 225368, no detailed description of the welding operation was provided or described (*i.e.*, the operation was simply described as "weld[ing] together steel from two coils"). As described above, we now have a far more complete description of the welding process. Furthermore, since the issuance of ruling 225368, Customs has thoroughly considered the effect of welding on merchandise, albeit for purposes of another Customs issue.

In Customs Service Decision (C.S.D.) 84–49, Customs had taken the position that the term "further processing", for purposes of item 806.30, TSUS (the predecessor to subheading 9802.00.60, HTSUS), did not include "the mere assembly of finished parts by * * *, welding, etc." The merchandise involved in C.S.D. 84–49 was aluminum can bodies imported into the United States to be assembled with easy-opening can ends by a welding operation. Under subheading 9802.00.60, when "[a]ny article of metal * * * manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing" duty is limited to the value of the processing outside the United States.

In a notice published under 19 U.S.C. 1625(c)(1) in the CUSTOMS BULLETIN and Decisions, vol. 29, no. 51, p. 56 (December 20, 1995), Customs advised that it was "reconsidering its position that a welding operation [regardless of its type or complexity] does not constitute 'further processing' for purposes of subheading 9802.00.60, HTSUS". Customs stated that it was proposing to modify C.S.D. 84–49 to reflect that certain welding ("such as gas tungsten arc welding * * * used in the assembly of nuclear fuel rods") constitutes "further processing" for purposes of the subheading. Customs stated that:

> Whether other types of welding operations * * * constitute "further processing" for purposes of subheading 9802.00.60, HTSUS, will be determined on a case-by-case basis.

In a notice published in the CUSTOMS BULLETIN and Decisions, vol. 30, no. 7, p. 52 (February 14, 1996), Customs gave notice that it was modifying C.S.D. 84–49, as described above.

The above-described Customs positions and actions are not precedential for this case (because the issue involved in subheading 9802.00.60, HTSUS, is whether the operation is "further processing" in the United states and the issue involved for purposes of NAFTA drawback under 19 U.S.C. 3333(a)(2)(A) and 19 CFR 181.45(b)(1) is whether the merchandise is in the "same condition"). However, the positions and actions do demonstrate that there are different kinds of welding operations (see also, *e.g.*, *McGraw-Hill Encyclopedia of Science & Technology*, vol. 19, pp. 416–424 (1987)), and that the effect of welding operations on Customs issues, at least in the described instance, will be determined on a case-by-case basis. Furthermore, there is another published Customs position in regard to the predecessor of subheading 9602.00.60, HTSUS, which is helpful in the analysis of the welding operation described in this case.

In protest Review Decision (P.R.D.) 75–22, Customs considered the applicability of item 806.30, TSUS (the predecessor to subheading 9802.00.60, HTSUS) to the "cabling" of insulated wire returned to the United States after processing abroad. The "cabling" operation was described as winding insulated conductors with one strand of bare conductor after which the triplex cable could be cut to proper lengths or several lengths could be welded together. Customs held that item 806.30 was inapplicable and that the "cabling" was not

"further processing" as required by item 806.30. In regard to the cutting or welding involved, Customs stated:

> Cutting the finished cable or welding several lengths together to fit the various sizes of reels specified by the customer is *nothing more than supplying the proper quantity of the finished product to the customer* and cannot be regarded as "further processing." [Emphasis added.]

We conclude that the welding operation in this case is the same. This welding operation, clearly used in the packaging of the coils of steel in sizes as ordered by customers, is "nothing more than supplying the proper quantity of the finished product to the customer." We note that you state that, rather than using the segments of steel coil which are welded, customers scrap the cut piece with the welded segments. The welding operation in this case meets the description in 19 CFR 181.45(b)(1)(v) of "[p]utting up in measured does, or packing, repacking, packaging or repackaging."

Accordingly, the coils that are welded together as described in this ruling are in the same condition, for purposes of 19 U.S.C. 3333(a)(2) and 19 CFR 181.45(b), as the imported coils which are not so welded. As such, the coils that are welded together are subject to the same treatment, under NAFTA, as that described in ruling HQ 225368 for the slitted coils. That is, such coils (welded together as described in this ruling) may qualify for *full* same condition drawback under section 203(a)(2) of the NAFTA Implementation Act (19 U.S.C. 3333(a)(2)) and 19 CFR 181.45(b); they may qualify for non-NAFTA temporary importation under bond (TIB) under U.S. Note 1(a), subchapter XII, Chapter 98, HTSUSA 19 U.S.C. 3333(a)(2), and 19 CFR 181.45(b); and they may qualify for withdrawal from a foreign trade zone (FTZ) for exportation (if they were so welded in the FTZ) without being subjected to the limitation in section 203(b)(5), NAFTA implementation Act (19 U.S.C. 81c(a)).

This does *NOT* mean that any welding operation may be performed on imported merchandise without its losing its status as "same condition", for purposes of 19 U.S.C. 3333(a)(2) and 19 CFR 181.45(b). Such determinations must be made on a case-by-case basis.

Holding:

The steel coils described in ruling HQ 225368, subject to welding operations as described in the FACTS portion of this ruling, are in the "same condition", under section 203 of the NAFTA Implementation Act (19 U.S.C. 3333) and 19 CFR 181.45(b), as the imported steel coils (which are not so welded). Such welded steel coils qualify for *full* same condition drawback under NAFTA and the NAFTA duty deferral rules do not apply to the welded steel coils for TIB and FTZ purposes (see ruling HQ 225368 and the LAW AND ANALYSIS portion of this ruling).

Effect on Other Rulings:

Ruling 225368, February 1, 1995, *MODIFIED.*

WILLIAM G. ROSOFF,
Director,
International Trade Compliance Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
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Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 96–78)

FLORAL TRADE COUNCIL, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., DEFENDANT-INTERVENORS

Court No. 95–04–00382

[ITC determination sustained.]

(Dated May 17, 1996)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and *Amy S. Dwyer)* for plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, Office of the General Counsel, United States International Trade Commission *(Anjali K. Hansen)* for defendant.

Arnold & Porter (Michael T. Shor and *William L. Busis), Wiley, Rein & Fielding (John A. Hodges, Alan H. Price, Willis S. Martyn III* and *Stephanie L. Goodman)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court following a motion for judgment upon the agency record pursuant to USCIT Rule 56.2. The motion has been brought by plaintiff Floral Trade Council ("FTC") challenging the negative material injury determination of the United States International Trade Commission (the "Commission") in *Fresh Cut Roses From Colombia and Ecuador,* USITC Pub. 2862, Inv. Nos. 731–TA–684–685 (March 1995) (final negative determ.) [hereinafter *"Final Det."]. See Fresh Cut Roses From Colombia and Ecuador,* 60 Fed Reg. 14,448 (USITC 1995).

BACKGROUND

On February 14, 1994, FTC and other interested parties filed a petition with the Commission and the International Trade Administration of the United States Department of Commerce ("Commerce"), alleging that an industry in the United States was materially injured or threatened with material injury by reason of less than fair value ("LTFV") imports of fresh cut roses from Colombia and Ecuador. The Commission determined that the domestic industry producing fresh cut roses was neither materially injured nor threatened with material injury by rea-

son of LTFV imports. *See Final Det.* at I–3 & n.2 (Vice Chairman Nuzum and Commissioner Rohr dissenting).

In the final determination, the Commissioners[1] found one like product consisting of all fresh cut roses and noted that there are at least one hundred species and thousands of varieties of roses. *Id.* at I–5–I–6. The Commissioners cumulated imports from Colombia and Ecuador for both their present material injury and threat of material injury determinations. *Id.* at I–15, I–26.

The Commissioners found that the fresh cut roses industry is subject to recurrent seasonal demand cycles that cause prices to fluctuate significantly. *Id.* at I–11. They cited Valentine's Day, Christmas, Easter, and Mother's Day as peak or significant demand periods for roses. *Id.* Because domestic production capacity is constrained, the Commissioners found that domestic rose growers "generally respond to these swings in demand with changes in prices rather than changes in shipments." *Id.*

Standard of Review

The court will hold unlawful those determinations of the Commission found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

Discussion

In determining whether a domestic industry is materially injured by reason of the imports under consideration, the Commission must consider:

> (I) the volume of imports of the merchandise which is the subject of the investigation,
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States.

Id. § 1677(7)(B)(i) (1988). Pursuant to 19 U.S.C. § 1677(7)(B)(ii), the Commission may also consider "such other economic factors as are relevant to the determination." *Id.* No single factor, however, is determinative, and the Commission considers all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.* § 1677(7)(C)(iii).

I. *Volume of Subject Imports:*

In analyzing the subject import volume, "the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." *Id.* § 1677(7)(C)(i). Despite increases in absolute volume and market share by the subject

[1] The "Commissioners" herein refers to the four Commissioners comprising the majority negative determination: Chairman Watson and Commissioners Newquist, Crawford, and Bragg.

imports, the Commissioners did not find the volume of subject imports to be significant. *See Final Det.* at I–18. Specifically, the Commissioners found that subject imports increased in volume from 380.4 million stems valued at $92.6 million in 1991 to 438.2 million stems valued at $94.4 million in 1992 to 534.8 million stems valued at $109.2 million in 1993. *Id.* at I–17. In interim (Jan.–Sept.) 1993, subject import volume was 413.2 million stems valued at $86.3 million, compared to 467.2 million stems valued at $101.6 million in interim 1994. *Id.* In terms of market share, the Commissioners found that cumulated subject imports increased by quantity throughout the period of investigation ("POI") from 46.1% of the U.S. market in 1991 to 56.0% in 1993 and from 57.0% in interim 1993 to 60.6% in interim 1994. *Id.* By value, the U.S. market share of cumulated subject imports increased from 39.8% in 1991 to 46.6% in 1993, and was 47.6% in interim 1993, compared to 52.1% in interim 1994. *Id.* at I–17–I–18.[2]

Plaintiff argues that the Commissioners' finding that the volume of subject imports was not significant, either absolutely or relative to domestic production or consumption, is not supported by substantial evidence. Plaintiff contends that statistical evidence established that the volume of subject imports was "massive and increasing." Moreover, plaintiff emphasizes that, with regard to the domestic industry, the Commissioners found that "[m]ost of the performance indicators of the U.S. industry declined from 1991 to 1993, including production capacity, production, U.S. producers' domestic shipments, number of employees, net sales, and net income." *Id.* at I–13. Additionally, the Commissioners found that domestic producers' U.S. shipments decreased in terms of both quantity and value from 368.2 million stems, valued at $118.4 million, in 1991 to 341.2 million stems, valued at $106 million, in 1993. *Id.* Plaintiff asserts that a "massive and increasing" volume of subject imports combined with a corresponding decline in domestic shipments (a 7.3% decline in volume and a 10.8% decline in value) "is the hallmark of a material injury finding." Pl.'s Mem. P. & A. in Supp. Mot. J. Agency R. at 8.

The Commissioners, however, found that while subject imports increased by 40.6% over the POI, and by 13.1% between interim periods, the rate of increase in their market share did not rise commensurately, increasing only 9.9% from 1991 to 1993, and by 3.6% between interim periods. *Id.* at I–18. They attributed this occurrence to the 15.6%

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[2] Prior to the vote in these final investigations, Commerce notified the Commission that it found zero or *de minimis* margins with respect to five Colombian producers and that these five companies were excluded from Commerce's affirmative LTFV determination. *Final Det.* at I–18 n.109. As a result, the Commissioners did not include roses from those firms as subject imports, but because the Commission sought data for all years of the POI and interim 1994, yet only obtained specific data regarding the rose production of these five producers for 1993, the export data from the five Colombian producers is generally included in the information of record, which the Commission considered the best information otherwise available. *Id.*

The Commissioners further noted that these five companies represented 23% of total imports from Colombia in 1993 and, therefore, "the absolute volume and market share of cumulated subject imports are significantly less if the (fairly traded) exports of these five Colombian companies are excluded." *Id.* Nevertheless, the Commissioners stated that, "[w]e do not find the absolute volume or increase in market share of subject imports to be significant regardless of whether we consider the volume accounted for by the five Colombian rose exporters that were excluded from Commerce's order." *Id.* at I–18 n.110.

increase in overall apparent U.S. consumption by quantity between 1991 and 1993 and the 6.3% increase between interim periods. *Id.* The Commissioners concluded that "[t]his fact suggests that the subject imports were sold into important new markets and did not significantly displace domestic fresh cut roses in their existing markets." *Id.* Additionally, they found that "subject imports served largely to satisfy increases in demand in the mass merchandiser market." *Id.*

Plaintiff contends that the Commissioners' ultimate finding that the volume of subject imports was not significant was based on two subsidiary conclusions: (1) that the increase in subject import volume was substantially absorbed by the mass merchandiser segment of the market and did not impact domestic producer sales and (2) that domestic and imported roses had low substitutability and were, thus, insulated from direct competition.

A. *The Mass Merchandiser Market Segment:*

At the outset, plaintiff contests many of the Commissioners' findings regarding the mass merchandiser market segment. In particular, plaintiff claims that direct and indirect sales could not account for the increase in subject import volume and the mass merchandiser market segment was not growing as fast as subject import penetration. Plaintiff further asserts that, based on respondents' estimates in their posthearing brief that imports accounted for roughly 95% of all roses sold in the mass merchandiser market segment, the Commissioners arrived at "wildly ranging estimates" that at least 25–30% (or as much as 61–71%) of subject imports were sold to mass merchandisers in 1993. Plaintiff also contends that based on 1993 data alone, the Commissioners could not have found that the mass merchandiser market segment, and imports directed into that segment, expanded over the POI. Finally, plaintiff argues the Commissioners should have considered the volume of imports, and the increase in that volume, in other market segments where imports and domestic roses compete head to head.

The court will address plaintiff's contentions in turn. First, plaintiff contends that the mass merchandiser market segment could not account for the increase in subject import volume as importers and domestic producers sold only a small fraction of their output directly to mass merchandisers (an average of 5.3% and 2.9%, respectively, of their total rose production in 1993). *See id.* at II–13–II–14. Plaintiff emphasizes that, on average, 84.9% of importers' 1993 sales to the United States are to unrelated wholesalers and 5.4% to unrelated retail florists. *See id.* at II–14. Furthermore, plaintiff argues that indirect sales from wholesalers to mass merchandisers could not account for the increase in subject imports.

Defendant, however, counters that the Commission received data on direct sales to mass merchandisers through questionnaire responses, but when the Commission became aware that wholesalers sold a far greater percentage of the roses purchased by mass merchandisers, the Commission solicited data from the parties regarding the amount of

such resales. The parties disagreed on the amount of roses wholesalers sold to mass merchandisers and the extent of the mass merchandiser market segment generally. *See id.* at I–19 n.115. Defendant claims that based upon a combination of the questionnaire data, the estimates submitted by the parties, and the data on consumption, the Commission found the size of the mass merchandiser market segment to range from 15.4 to 36.0% of total U.S. consumption in 1993. *See id.*

Plaintiff objects to the fact that the Commission questionnaire did not request information from purchasers regarding the percentage of their resales to retail florists as opposed to mass merchandisers. The court, however, notes that plaintiff was given an opportunity to comment on the questionnaire before it was finalized and failed to make an objection before the Commission. Tr. of Oral Argument at 110 (Ct. Int'l Trade Feb. 22, 1996). Absent such a timely objection, the court finds that the Commissioners reasonably relied on the evidence presented in determining the size of the mass merchandiser market relative to U.S. consumption. *See Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1103 (1992) (argument may be waived by party if not raised at administrative level, resulting in prejudice).

Plaintiff's second claim of error is that the Commissioners failed to explain what evidence supported findings that "significant new markets for fresh cut roses" had emerged, that the mass merchandiser market segment was "the fastest growing market for fresh cut roses in the United States," that sales to this market drove the growth in U.S. apparent consumption during the POI, or that the mass merchandiser market segment was growing as rapidly as subject import penetration. *See id.* at I–12, I–13, I–19 n.114–15. Although plaintiff acknowledges that the Commissioners cited the Commission's economic memorandum and hearing testimony to support these conclusions, plaintiff claims that the economic memorandum did not state that the mass merchandiser market was newly developed during the POI and testimony of a former Commissioner that the mass merchandiser market was "new" in these investigations was not sufficient to support such findings. Additionally, plaintiff claims that the Commissioners relied primarily on purchaser questionnaire responses, which were anecdotal and biased, to support its findings of a growing mass merchandiser market segment.

Defendant counters that the Commissioners reasonably considered the increasing consumption by mass merchandisers and the fact that mass merchandisers were served primarily by subject imports. *See id.* at I–12, II–13 & n.51. Defendant contends that there was ample evidence in the record to support the Commissioners' finding that mass merchandisers were primarily responsible for the growth in U.S. rose consumption. *See id.* at I–12–I–13 & n.66 (citing *Final Det.* at II–19, Final Economic Memorandum at 12, Pet'rs' Posthear. Br. at 31). Defendant claims that importers repeatedly stated in response to the Commission questionnaires that demand increased because of increasing sales to mass merchandisers (as well as availability of new varieties and colors)

and that many domestic producers also cited the increase in sales to mass merchandisers. *See* Def.'s Opp'n to Pl.'s Mot. J. Agency R., Ex. 1 (importers' questionnaires); Pet'rs' Conf. Posthear. Br., List 2, Doc. 20, Ex. 13, at 28 (Feb. 3, 1995) (Roses Inc. Bulletin stating "[m]ost of the dramatic growth in floriculture sales including that of cut roses has come from growth in Mass Markets"). The court recognizes that "assessments of the credibility of witnesses are within the province of the trier of fact. This [c]ourt lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1092, 699 F. Supp. 938, 953 (1988) (citations omitted). Accordingly, the court finds that the Commissioners reliance on its staff's economic memorandum, hearing testimony, and importer questionnaires to support their findings regarding the importance and growth of the mass merchandiser market relative to demand and consumption was reasonable.

Additionally, plaintiff claims that the Commissioners unjustifiably ignored the impact of subject imports on domestic producers within the mass merchandiser market segment. Plaintiff argues that the domestic producers' low penetration of the mass merchandiser market segment was a manifestation of import injury. The Commissioners, however, found that the domestic producers were not able to provide consistently the large quantities of roses that mass merchandisers require nor were they able to satisfy demand in all market segments during times of peak demand, especially during Valentine's Day, which accounts for the largest volume of rose sales for any given period. *See Final Det.* at I–18–I–19. The Commissioners also found that while importers of Colombian and Ecuadorean roses have "aggressively targeted and developed the mass merchandiser market over the period of investigation," domestic producers, with few exceptions, have not done so and instead "focused primarily on their traditional retail customer base." *Id.* at I–18. Finally, the Commissioners noted that the imported Visa rose helped stimulate mass merchandiser market demand because it is a lesser quality, yet durable, rose variety that domestic producers could not compete with and could not produce due to its low yield. *See id.* at I–19 n.114.

Plaintiff contends that both domestic producers and importers sold roses directly to mass merchandisers or to wholesalers who resold to mass merchandisers. As wholesalers that resold domestic and imported roses were the main suppliers to the mass merchandisers, plaintiff claims the Commissioners unreasonably concluded that only a few domestic growers sold to that market segment based on evidence of direct sales. Plaintiff also argues that domestic producers were able to consistently provide the large quantities of roses that mass merchandisers require and did so. Plaintiff further claims that the Commission collected actual sales data reported by individual domestic growers and importers that established that domestic growers supplied a greater

quantity of certain rose products to mass merchandisers than did importers. *See* Conf. Staff Rpt., List 2, Doc. 29, at I–78–I–80.

The court finds that substantial evidence supports the Commissioners' findings that importers targeted and captured most of the mass merchandiser market and that domestic producers were not able to adequately supply both the retail sector and the mass merchandiser market segment. The Commissioners relied upon hearing testimony, purchaser letters and questionnaire responses, purchaser statements in response to verification of lost sales allegations, and evidence that imported roses, which were impractical for domestic growers to produce, were physically better suited for the mass merchandiser market. As trier of fact, the Commission must assess the quality of the evidence and give such weight to the evidence that it believes is justified. *Iwatsu Elec. Co. v. United States,* 15 CIT 44, 47, 758 F. Supp. 1506, 1509 (1991). The court also finds that the Commissioners reasonably concluded that domestic producers' low penetration in the mass merchandiser market was not a sufficient indication of material injury.

Finally, plaintiff argues that the Commissioners disregarded the wholesale and retail florist market segments, where domestic roses and subject imports compete directly. Plaintiff claims that the largest volume of direct sales from importers and domestic growers competed in the wholesaler market segment, as wholesalers are free to resell either imported or domestic roses to mass merchandisers. Moreover, based on the Commissioners' estimates of the size of the mass merchandiser market segment, plaintiff asserts that the remaining import sales to retail florists was relatively large. Accordingly, plaintiff maintains that the Commissioners should have found the volume of subject imports significant in both of these market segments.

The Commissioners did not declare imports insignificant in the retail florist segment. The analysis proceeded on a different basis. At the outset, the Commissioners considered the fresh cut rose market as a whole. The Commissioners considered aggregate subject import volumes, aggregate domestic consumption, and aggregate subject import market share. *See Final Det.* at I–17–I–18. Next, the Commissioners considered the significant volume and market share data in light of increasing domestic consumption, inadequacy of domestic supply, the importance of non-price factors, and the limited substitutability between domestic and imported roses across all market segments. Accordingly, the court finds that the Commissioners properly considered all market segments.

B. *Substitutability:*

According to plaintiff, the second major basis for the Commissioners' determination that the volume of subject imports was not significant was the lack of substitutability between domestic and imported roses. This was an important factor. The Commissioners found that the limited substitutability between domestic roses and subject imports along with other non-price factors diminished the volume impact of subject imports. *Id.* at I–20. Much of the Commissioners' discussion regarding

substitutability, however, centered on the effect of LTFV imports upon domestic prices. *See id.* Accordingly, the court will consider the issue in that context.

II. *Effect of Subject Imports on Domestic Prices:*

In analyzing the price effects of subject imports on domestic prices, the Commission must consider whether "(I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii).

The Commissioners found a number of factors relevant to their determination of the effect of subject imports on domestic prices, including the limited degree of substitutability between domestic and subject roses, the nature of demand for roses, and the availability of supply. *Final Det.* at I–21. The Commissioners stated that "price plays a subordinate role to other factors such as product quality, variety, and the seasonality of demand." *Id.* The Commissioners concluded that price comparisons in this industry had little probative value for several reasons: (1) there was mixed underselling and overselling by the subject imports with no consistent trend across channels of distribution or by type of sale; (2) there was little or no evidence of price depression as seasonal demand shifts drove price patterns; (3) there was no "significant" price suppression because domestic growers could not have raised prices to cover costs even in the absence of LTFV imports; and (4) other non-price factors and lack of correlation between the domestic and imported rose prices limited the effect of the subject imports on price. *See id.* at I–21–I–24. Plaintiff argues that each of the Commissioners' findings was based upon conjecture, mistake, or unverified allegations by parties opposed to the petition[3] and that factual information, collected by the Commission staff and supported by statistical analysis, established a direct and substantial nexus between subject import and domestic prices.

A. *Evidence of Mixed Underselling and Overselling:*

Plaintiff contends that subject imports consistently undersold domestic roses in the primary channel of distribution, the wholesale spot market, as well as in secondary channels. Specifically, plaintiff states that Colombian roses undersold U.S. roses in 56 of 60 instances for the low-end red rose comparisons, 107 of 166 instances for the high-end red rose comparisons, and in 62 of 101 instances for the non-red rose comparisons. *Final Det.* at II–56–II–57. Ecuadorean roses undersold U.S. roses in 34 of 39 instances for the low-end red rose comparisons, in 111 of the 152 instances for the high-end red rose comparisons, and in 16 of 26 instances for the non-red rose comparisons. *Id.* at II–57.

[3] Plaintiff's argument that the Commissioners based their findings on unverified and biased claims of interested parties was presented to the Commission and rejected. The court declines to reweigh this evidence. *See Iwatsu Elec. Co.*, 15 CIT at 47, 758 F. Supp. at 1509.

With respect to pricing trends by channel of distribution, 89.1% of imported and 62.4% of domestic rose sales were made at the wholesale level of distribution. *Id.* at II–13–II–14. The Commissioners noted that underselling occurred in spot sales of both low-and high-end roses to wholesalers in 56 out of 60 comparisons and in 49 out of 60 comparisons in spot sales to retail florists. *See id.* at I–33 n.23. Plaintiff claims that subject imports undersold domestic roses in nearly every quarter over the POI and interim 1994 and this pattern was repeated for all three hybrid tea roses examined.

The court finds no error in the Commissioners' consideration of the pricing data. The Commissioners reasonably found the value of price comparisons limited by the large, daily price fluctuations of spot sales, the fact that certain comparisons were based on sales of significantly different quantities, which could have affected relative prices, and the limited substitutability between domestic and imported roses. *See id.* at I–22.

B. *Price Depression:*

Plaintiff contends that subject imports depressed or suppressed prices to a significant degree notwithstanding increasing consumption. Plaintiff claims that "statistical analysis" established, and respondents admitted, that domestic and imported rose prices were positively correlated during the POI. Even without such a correlation in prices, plaintiff argues that the inability of domestic producers to raise prices to a profitable level—where an increasing number of U.S. growers reported losses, where domestic shipments were declining in a rising market, and where domestic growers were leaving the industry—established that domestic prices were depressed and suppressed.

In finding little or no evidence of price depression, the Commissioners cited fluctuations in price for both subject imports and domestic roses, with prices for red roses generally peaking in the first quarter of each year of the investigation, falling to lower levels during the remaining quarters, and reaching their nadir in the third quarter. *Id.* at I–22–I–23. The Commissioners also stated that prices for non-red roses similarly demonstrated seasonal fluctuations, although not as dramatically. *Id.* at I–23. Furthermore, the Commissioners found that taking seasonal fluctuations into account, prices of domestic roses were generally steady, decreasing only slightly during the POI, despite the fact that subject import prices of red roses fluctuated downward. *Id.* In sum, the court finds that the Commissioners' determination that there was no evidence of price depression as seasonal demand shifts dictated pricing patterns was supported by the record.

C. *Price Suppression:*

As for price suppression, the Commissioners found that subject imports did not suppress domestic prices to a significant degree. *Id.* After considering petitioners' argument that domestic producers were unable to raise prices sufficiently to cover costs, three of the Commissioners found that domestic producers could not have done so even in

the absence of LTFV imports from Colombia and Ecuador. *Id.* at I–23 & n.141 (Commissioner Newquist did not concur in this finding.). The three Commissioners based this finding on the fact that most purchasers questioned, stated that the current price of subject imports would have to be more than 10% higher to cause them to shift their purchases to domestic roses and the fact that non-subject imports would limit domestic price increases in the absence of LTFV imports from Colombia and Ecuador. *Id.* at I–23 & nn.141–43; *see* I–24 n.147; *see* I–25 n.153. Commerce determined that the final "all others" dumping margins were 6.41% for Colombia and 6.32% for Ecuador. *See Fresh Cut Roses from Colombia,* 60 Fed. Reg. 6980, 7018 (Dep't Comm. 1995) (final determ. of LTFV sales); *Fresh Cut Roses from Ecuador,* 60 Fed. Reg. 7019, 7043 (Dep't Comm. 1995) (same). Plaintiff argues that such reasoning is contrary to law as Congress has admonished the Commission not to weigh injury caused by imports against other causes, including "the volume and prices of imports sold at fair value" and "changes in patterns of consumption." S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 460; *accord* H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979).

Defendant counters that considering what the condition of the domestic industry would have been absent LTFV imports is not an unlawful weighing of causes, rather it isolates the effects of LTFV sales on the industry. Although this is a fine distinction, it has been upheld in the past. *See General Motors Corp. v. United States,* 17 CIT 697, 706, 827 F. Supp. 774, 783–84 (1993).[4] The Commissioners' finding that purchasers would not switch purchases from subject imports to domestic products despite antidumping duties was coupled with a comparison of subject import volumes subsequent to Commerce's preliminary LTFV determination which did not reveal any significant drop-off in volume notwithstanding the fairly significant LTFV preliminary margins. *Final Det.* at I–23–I–24 & n.146. These findings supported the Commissioners conclusion that there was limited substitutability between domestic roses and subject imports.

D. *Non-Price Factors and Substitutability:*[5]

The Commissioners found as a significant condition of competition in the industry, the fact that "fresh cut roses are not a homogeneous product, and there is a wide range of varieties of roses commercially available that satisfy different consumer preferences." *Id.* at I–11. While some

[4] There appears to be, at least, a potential clash between this practice and the language of 19 U.S.C. § 1673 (1988) because the practice concentrates the inquiry on injury by reason of the dumping itself as opposed to injury "by reason of imports" which are dumped. The clash is only theoretical, however. In *Hyundai Pipe Co. v. United States,* 11 CIT 117, 120, 670 F. Supp. 357, 360 (1987), the court approved consideration of the margin of dumping as a discretionary factor in the material injury analysis and it has not wavered from this view. This approach is now codified in 19 U.S.C. § 1677(7)(C)(iii) (1994) (definition of material injury/impact on the affected domestic industry). While this statutory addition is not applicable to this earlier case, it certainly indicates that there is little reason to narrow *Hyundai* and to prevent the focus on the effects of the dumping itself, rather than simply the presence of the dumped imports in the market.

[5] Commissioner Newquist did not join in the plurality's discussion concerning "substitutability" between imported and domestic roses. *See Final Det.* at I–16 n.96. Once a like product determination is made, Commissioner Newquist declines to make other substitutability findings. *Id.* Commissioner Newquist, however, does consider characteristics and uses of the various domestic and imported products in his causation analysis.

varieties are offered exclusively by U.S. growers, the Commissioners found that others are offered exclusively by Colombian and/or Ecuadorean growers. *Id.* The Commissioners noted that "Colombian and Ecuadorean roses generally have longer, thicker stems, larger blooms, and more vibrant colors than domestic roses due to the ideal growing conditions in Colombia and Ecuador." *Id.* On the other hand, the Commissioners found that "[d]omestic roses are usually fresher than imported roses due to the proximity of production operations to purchasers." *Id.* at I–11–I–12.

The Commissioners also found that most purchasers questioned, reported that domestic roses were inferior in quality to subject imports. *Id.* at I–21 & n.125. Furthermore, the Commissioners determined that purchasers deemed product quality, which includes physical attributes such as stem length and thickness, bloom size, color, freshness, and durability (vase-life), more important than price. *Id.* at I–21 & n.126. The Commissioners stated that purchasers cited bloom size and availability of particular quantities and types of roses as the two most important factors they consider when making purchases and some purchasers, when contacted by the Commission, stated that these factors led them to buy imports in lieu of domestic roses. *Id.* Additionally, the Commissioners found that in many instances, despite the availability of lower-priced roses, sales of more expensive rose varieties increased, which further confirmed their finding that price plays a subordinate role to non-price factors such as product quality. *Id.* at I–21–I–22.

Plaintiff argues that the record contains ample evidence that, although domestic and imported roses may be distinguishable, they are substitutable. For example, plaintiff cites evidence indicating that, "while subject imports may have longer, thicker stems, larger blooms, more vibrant colors, domestic roses perform better because they are fresher." Pl.'s Mem. P. & A. in Supp. Mot. J. Agency R. at 31. The court does not find that this fact supports plaintiff's contentions, rather it supports the Commissioners' conclusion that there is low substitutability between the products. Plaintiff also points out an alleged inconsistency with Commissioner's Newquist's statement that, while domestic and imported roses are substitutable given the Commissioners' like product determination, "imported roses supply specific consumer preferences that domestic roses do not *(e.g.,* thicker stems, larger blooms)." *Id.* at I–16 n.96. The court, however, finds no inconsistency with Commissioner Newquist's statements as the plurality found limited substitutability, rather than none. Further, the court finds the Commissioners' conclusion regarding the importance of non-price factors and low substitutability between domestic and imported roses supported by the record. In sum, the court finds that the Commission's negative injury determination is supported by substantial evidence and is in accordance with law.

(Slip Op. 96–79)

AIMCOR, ALABAMA SILICON, INC., AMERICAN ALLOYS, INC., GLOBE METALLURGICAL, INC., AND AMERICAN SILICON TECHNOLOGIES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA FERROLIGAS MINAS GERAIS-MINASLIGAS, DEFENDANT-INTERVENOR

Consolidated Court No. 94–03–00182

[Commerce determination sustained.]

(Dated May 21, 1996)

Baker & Botts, L.L.P. (William D. Kramer and *Martin J. Schaefermeier)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John K. Lapiana), Dean A. Pinkert* and *Alexandra Levinson,* Attorney Advisors, United States Department of Commerce, of counsel, for defendant.

Dorsey & Whitney, P.L.L.P. (Munford Page Hall, II and *Philippe Bruno)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court following an anti-dumping duty remand determination, which was ordered herein in *AIMCOR v. United States,* Slip Op. 95–130 (Ct. Int'l Trade July 20, 1995), with which familiarity is presumed.

I. *Defendant-Intervenor's Objections to Remand Results:*

A. *Value-Added Taxes:*

Defendant-intervenor, Companhia Ferroligas Minas Gerais-Minasligas ("Minasligas"), a Brazilian producer of ferrosilicon, challenges Commerce's failure to exclude value-added taxes ("VAT") from the cost of materials in calculating constructed value. Exclusion of VAT was previously challenged by plaintiffs AIMCOR, Alabama Silicon, Inc., American Alloys, Inc., Globe Metallurgical, Inc., and American Silicon Technologies (collectively "AIMCOR"). On remand Commerce recognized what was apparent to the court during its original review of Commerce's final determination, that is, in the Brazilian VAT rebate system, VAT is not remitted or refunded *upon* exportation. *Final Remand Results* at 7–8; *see* 19 U.S.C. § 1677b(e)(1)(A) (1988). Thus, Minasligas' basic claim for a VAT deduction fails.

The court has held, however, that cost of materials may be viewed as VAT exclusive if VAT is refunded prior to exportation. *AIMCOR,* Slip Op. 95–130, at 21–22. The burden was on Minasligas to prove that its pre-exportation cost of materials did not include VAT, and it failed to do so.[1] *Final Remand Results* at 8. Therefore, Commerce's VAT treatment is sustained.

B. *Financial Expense:*

During the court's review of the original final determination, AIMCOR successfully argued that Commerce had inadequate information

[1] The court cannot discern whether the proof in *Camargo Correa Metais, S.A. v. United States,* 17 CIT 897, 909 (1993), was appreciably different from that presented here. It does appear that in *Camargo* there was an assumption that the tax was credited to at least one of the exporters "before export." *Id.* This is not the case here.

for the adjustment made to Minasligas' interest expense. *See AIMCOR*, Slip Op. 95–130, at 19. Commerce was also directed to reconsider its methodology. *Id.* at 19–20 n.18. Minasligas now challenges the new methodology employed on remand as overstating expenses. AIMCOR, while accepting the methodology in its original objection, states in response to Minasligas' objection that the methodology understates expenses.[2]

Whether or not Commerce's original methodology would have been acceptable in another case, Commerce did not have sufficient information to apply that methodology here. On remand it collected new data and also applied a new methodology. It calculated an interest expense ratio by dividing the sum of the combined monthly net interest expenses of Minasligas and its parent, with the monetary correction subtracted out, adjusted to year-end currency terms, by the sum of the combined historical cost of sales for both companies, and adjusted to year-end currency terms. That ratio was applied to replacement cost of materials for each month of the period of investigation. *See Final Remand Results* at 6–7; 12–13. While this method may not be perfect, it does not appear to overstate expenses. To obtain the ratio, monetary correction was subtracted from the numerator and not the denominator. If this is an error, it results in an understatement, not an overstatement. Any understatement would be magnified if the ratio were applied to historical costs as requested by Minasligas. Historical costs do not reflect full costs in a hyperinflationary economy. For example, use of inventoried goods in a hyperinflationary economy may distort actual costs.

Accordingly, Minasligas' challenge is rejected and Commerce's calculation is sustained.

II. *AIMCOR's Objection to Minasligas' U.S. Imputed Credit Expense:*

On remand, Commerce was to recalculate U.S. imputed credit expenses using a U.S. dollar-denominated interest rate. It did so by reference to Minasligas' only U.S. dollar loan, an aircraft lease. *Final Remand Results* at 5. Commerce rejected pre-shipment advances received by Minasligas in anticipation of U.S. customers' payments of sale that were actually paid in cruzeiros. *Id.* This decision appears rational and well within Commerce's discretion.[3] Furthermore, it is too late to raise the issue of whether the rate used was annual or monthly, and was appropriately treated as such. AIMCOR received draft remand results and was obligated to raise all objections in a timely manner, that is, after receipt of the draft and before issuance of the final remand results. It did not do so.

CONCLUSION

Commerce's remand results are sustained in their entirety.

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[2] Any request for remand by AIMCOR on this point is untimely. Such request should have been set forth in AIMCOR's original objection.

[3] The court also rejects AIMCOR's view that the interest rate was not short-term.

(Slip Op. 96–80)

ANVAL NYBY POWDER AB, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00183

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

(Decided May 21, 1996)

Sonnenberg & Anderson (Philip Yale Simons, Jerry P. Wiskin, Michelle D. Mancias), counsel for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *Amy Rubin,* Civil Division, Dept. of Justice, Commercial Litigation Branch; *Beth C. Brotman* and *Myron P. Barlow,* Office of Assistant Chief Counsel, U.S. Customs Service, of counsel, for Defendant.

OPINION

POGUE, *Judge:* Plaintiff, Anval Nyby Powder AB, invokes this Court's jurisdiction under 28 U.S.C. 1581(a) (1994).[1] The action involves the proper classification of cobalt alloy powders within heading 8105 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] Customs' classification is before this Court for de novo review pursuant to 28 U.S.C. § 2640(a) (1994) on the summary judgment motions of the plaintiff and the defendant. Upon liquidation the United States Customs Service ("Customs") classified the cobalt alloy powders as "Unwrought cobalt: Alloys" under subheading 8105.10.30, HTSUS, and assessed a 5.5% *ad valorem* duty. Plaintiff claims that the cobalt alloy powders are properly classified duty free under subheading 8105.10.90, HTSUS, as "Other." Neither party disputes that the cobalt alloy powders are properly classified under subheading 8105.10. Both parties also agree that the merchandise is a powder[3] and an alloy[4] within the meaning of the HTSUS. Subheading 8105.10 covers cobalt mattes and other intermediate products of cobalt metallurgy; unwrought cobalt; waste and scrap; and powders. Subheading 8105.10 is further subdivided into subheadings 8105.10.30 and 8105.10.60 which are provisions for unwrought cobalt (alloys and other, respectively) and sub-

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[1] The action is limited to those entries covered by Protest Numbers 1001–94–105372 and 1001–94–106289. Plaintiff as the importer of record and consignee of the merchandise timely filed these protests which Customs denied. On February 17, 1995, Plaintiff timely commenced the instant action, having previously paid all liquidated duties for the entries covered by Protest Numbers 1001–94–105372 and 1001–94–106289.

[2] The provisions under consideration are as follows:

8105	Cobalt mattes and other intermediate products of cobalt metallurgy; cobalt and articles thereof, including waste and scrap:	
8105.10	Cobalt mattes and other intermediate products of cobalt metallurgy; unwrought cobalt; waste and scrap; powders;	
	Unwrought cobalt:	
8105.10.30	Alloys	5.5% *ad valorem*
8105.10.60	Other	Free
8105.10.90	Other	Free

[3] The cobalt alloy powders are powders for tariff purposes: the maximum size of any powder is significantly less than 1mm and more than 90% of the powders in issue would pass through a sieve with an aperture of 1mm. Note 6(b) to Section XV, HTSUS.

[4] The powders in issue are cobalt alloys for tariff purposes: the content of the respective base metal (cobalt) is, by weight, less than 99%, but not less than any other metallic element. Additional Note 1 to Chapter 81, HTSUS.

heading 8105.10.90, a residual or basket provision which covers the balance of merchandise within the scope of the 8105.10 subheading. The issue before the court is whether the cobalt alloy powders should be classified under subheading 8105.10.30 as "Unwrought cobalt" or under subheading 8105.10.90 as "Other."

UNDISPUTED FACTS

The chemical composition of the cobalt alloy powders in issue varies depending on their use; in plaintiff's merchandise, the metallic elements normally alloyed with cobalt are chromium, tungsten, iron and nickel. Cobalt is the predominant base metal contained in the cobalt alloy powders in issue, with concentrations ranging between 31.2% and 62.6% by weight.

Plaintiff's cobalt alloy powders are produced by an inert gas atomization process. Predetermined amounts of cobalt metal and the alloying metals make a composition which is placed in an induction furnace and melted. After melting, samples are taken and the chemical composition of the melt is determined by x-ray spectroscopy and other means to ascertain whether it is of the desired composition. If the composition of the melt does not meet specifications, cobalt or other metals are added to the melt until the desired composition is achieved.

When the melt has the desired composition, the molten alloy is poured into a tundish which has holes in its base. The molten metal flows through the base and is passed through a nozzle which can withstand high temperatures. As the alloy composition passes through the nozzle, it encounters a stream of inert gas of either nitrogen or argon, which causes the metal to form liquid droplets. The droplets solidify into spherical forms as they fall inside a collection tank. The spherically-shaped powders collect at the bottom of the collection tank where they cool to room temperature, and are further bathed in the inert gas to prevent any chemical reaction with oxygen in the air.

Plaintiff's cobalt alloy powders are specially manufactured to produce a spherical shape with small sizes and uniform distribution. A screening table comprised of two screens of different mesh sizes is used. The two screens are parallel to each other and separated by several inches. For cobalt alloy powders, the top screen normally has a mesh size of 250 microns and the bottom screen has a mesh opening of 53 microns.[5] Once collected from the furnace, the powder is placed on the top screen—powder particles greater than 250 microns remain on the screen and particles smaller than 250 microns fall onto the 53 micron screen. Normally, the particles greater than 250 microns and less than 53 microns are not sold commercially, but are used as a raw material in manufacturing other metal powders.

The fraction which has particles between 53 and 250 microns is passed through the system again to further remove larger and smaller particles which were not separated on the initial pass. After the second

[5] A micron is 1/1000 of a millimeter.

pass, a sample of the particles which are retained by the 53 micron screen are then passed through a series of screens which satisfy the American Society of Testing Materials ("ASTM") E11 specification to produce the actual size and distribution which is placed on the test certificate.

When the imported merchandise is used in an intended application, the resulting product does not possess the dimensional features of the cobalt alloy powder. The imported merchandise is only used for two applications: plasma arc welding[6] and thermal spraying.[7] (Tingskog Aff. ¶ 8 *filed with* Plaintiff's Reply to Defendant's Supplemental Brief Submitted Pursuant to the Court's March 22, 1996). In these applications, the powder must be melted for it to form as solid mass which conforms to the shape of the weld or the article being coated. *(Id.)* Neither the weld nor the coating is in a powder form. *(Id.)* The powders are often used in coating automotive and other valves.

STANDARD OF REVIEW

Rule 56 of this court permits summary judgment when "there is no genuine issue as to any material fact. * * *" USCIT R. 56(d); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987); *Glaverbel Société Anonyme v. Northlake Marketing & Supply, Inc.*, 45 F.3d 1550 (Fed. Cir. 1995).

In considering whether material facts are in dispute, the evidence must be considered in a light most favorable to the non-moving party, drawing all reasonable inferences in its favor, as well as all doubts over factual issues. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Anderson*, 477 U.S. at 253; *Mingus*, 812 F.2d at 1390–91. Nevertheless, "when a motion for summary judgment is made and supported * * * an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but * * * must set forth specific facts showing that there is a genuine issue for trial." USCIT R. 56(f). Once it is clear there are no material facts in dispute, a case is proper for summary adjudication. This is such a case.

Customs' classification is before this court for de novo review pursuant to 28 U.S.C. § 2640(a) (1994). The court is to "make its determinations upon the basis of the record made before the court." *Id.* The court's

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[6] Plasma arc welding is defined as "welding metal in a gas stream heated by a tungsten arc to temperatures approaching 60,000°F (33,315°C)." MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 1441 (4th ed. 1989). "An arc welding process that produces coalescence of metals by heating them with a constricted arc between an electrode and the workpiece (transferred arc) or the electrode and the constricting nozzle (nontransferred arc). Shielding is obtained from hot, ionized gas issuing from an orifice surrounding the electrode and may be supplemented by an auxiliary source of shielding gas, which may be an inert gas or a mixture of gases. Pressure may or may not be used, and filler metal may or may not be supplied." METALS HANDBOOK: DESK EDITION 1-29 (Howard E. Boyer, Timothy L. Gall, eds. ASM 1985).

[7] Thermal Spraying is defined as a "[g]roup of processes in which finely divided metallic or nonmetallic materials are deposited in a molten or semimolten condition to form a coating." B.J. MONIZ, METTALURGY 527 (2d. ed. American Technical Publishers, Inc. 1994). Plasma Spraying is a "thermal spraying process in which the coating material is melted with heat from a plasma torch that generates a nontransferred arc * * *; moltencoating material is propelled against the basis metal by the hot, ionized gas issuing from the torch." METALS HANDBOOK: DESK EDITION 1-29 (Howard E. Boyer, Timothy L. Gall, eds. ASM 1985).

review may go beyond the issues considered in Custom's administrative determination. Specifically, the court may act on grounds which have not been considered by the agency below. 28 U.S.C. § 2638 (1994). In addition, the legislative mandate specifically directs the court to determine the correct classification for the merchandise involved. 28 U.S.C. § 2643(b) (1994). To establish a classification for the goods at issue, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, *reh'g denied,* 2 Fed. Cir. (T) 97 (1984). These statutory provisions require the court to decide the correct classification of cobalt alloy powders by determining the proper meaning of the applicable tariff subheadings.

"The ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision * * * entails a two step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed." *Sports Graphics, Inc. v. United States,* 24 F.3d 1390, 1391 (1994). The first step is a question of law and the second step is a question of fact. *E.M. Chem. v. United States,* 9 Fed.Cir. (T) 33, 35 (1990).[8]

DISCUSSION

The principal issue in this case concerns the interpretation of subsection 8105.10 of the HTSUS. In addition, the defendant has placed in issue the standard of review the court should apply in resolving classification cases: specifically, whether *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), applies to routine classification cases involving disputed interpretations of the HTSUS.

I

Chevron sets forth a two-step analysis for court review of agency interpretations of statutes: Using the traditional tools of statutory construction, the court ascertains whether congressional intent on the disputed issue is clear, and, if clear, the court applies the statute in the manner Congress intended, regardless of the agency's position.[9] If the statute is ambiguous, the court, rather than interpreting the statute

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[8] To determine the proper meaning of tariff terms in the statute, the terms are "construed in accordance with their common and popular meaning, in the absence of contrary legislative intent." *E.M. Chem. v. United States,* 920 F.2d 910, 913 (Fed. Cir. 1990). Courts may rely upon their own understanding of the term used, and may consult dictionaries, scientific authorities, and other reliable sources of information. *Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 90, 92 (1982) (citations omitted); *Brookside Veneers, Ltd. v. United States,* 6 Fed. Cir. (T) 121, 846 F.2d 786, 789 (Fed. Cir. 1988), *cert. denied,* 488 U.S. 943; *see also Texaco Marine Services, Inc. v. United States,* 44 F.3d 1539 (Fed. Cir. 1994). "[W]hile courts have relied primarily upon lexicons and other similar authorities, courts may and do look to the testimony of record to determine the common meaning of a tariff term, a question of law. Such testimony may properly be considered simply as advisory and as aiding the memory and understanding of the court, and it is not binding and may be accepted or rejected as appears proper." *Marubeni America Corp. v. United States,* 915 F. Supp. 413, 416–17 (1995).

[9] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

anew and rendering its own interpretation, must defer to an administrative agency's "permissible construction of the statute."[10]

The United States Court of International Trade (CIT) has sparingly cited *Chevron*'s two-step analysis in classification cases.[11] Instead, the court has expressly rejected *Chevron*'s application to classification cases. *Semperit Indus. Prod., Inc v. United States,* 855 F. Supp. 1292, 1299–1300 (1994). The *Semperit* court reasoned that the CIT's statutory mandate to find de novo[12] the correct result in a classification case[13] was logically incompatible with *Chevron* deference.[14] *Semperit,* 855 F. Supp. at 1300.[15]

Additional reasons support rejection of *Chevron's* two-step analysis in routine classification cases. The CIT has exclusive jurisdiction over classification cases.[16] The CIT, together with its predecessors, the Customs Court and the Board of General Appraisers, have interpreted the tariff schedules of the United States since 1890.[17] To change the court's longstanding practice of interpreting the tariff schedules and the opera-

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[10] *Id.* at 843 ("If, * * *, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[11] *See, e.g., Mitsui Foods, Inc. v. United States,* 12 CIT 276, 280 (1988). *Mitsui* does not stand for the proposition that Customs' interpretations of the tariff schedules are entitled to deference. The court in *Mitsui* deferred not to Customs, but to another agency: the National Marine Fisheries Service. The legal issue concerned whether American Samoa was properly excluded by the NMFS in its determination of "United States Pack." The court did not defer to Customs' interpretation of the statute, but applied *Chevron* to defer to the Fisheries Service definition "United States Pack." *Mitsui,* 12 CIT at 282.

[12] 28 U.S.C. § 2640(a)(1) (1994). *See also* H.R. REP. NO. 1235, 96th Cong., 2d Sess. 59, *reprinted in* 1980 U.S.C.C.A.N. 3729 at 3770 ("Subsection (a)(1) provides for a trial de novo in the Court of International Trade in a civil action commenced pursuant to section 515 of the Tariff Act of 1930."). *Chevron* has been broadly applied to cases involving statutory interpretation of agency administered statutes even though section 706 of the Administrative Procedure Act provides that "to the extent necessary * * * the reviewing court shall decide all relevant questions of law." 5 U.S.C. § 706 (1994). Classification cases, however, are not reviewed under the APA; Congress instead specifically designated these cases for de novo review by the Court of International Trade. *Compare* 28 U.S.C. § 2640(a) *with* § 2640(e).

[13] 28 U.S.C. § 2643 (1994); *Jarvis Clark,* 2 Fed Cir. (T) 70, 74–75, 878, *reh'g denied,* 2 Fed. Cir. (T) 97 (1984) ("The statute is more logically interpreted as mandating that the court reach a correct decision in every case. * * * [W]hether the court remands, conducts its own hearing, or simply examines the law and the tariff schedules on its own initiative, it is required to reach a correct result.").

[14] "Such deference is logically incompatible with the Court's role in customs classification cases because the standard in these cases requires the Court to reject any interpretation, *however reasonable,* that the Court determines to be incorrect." *Semperit,* 855 F. Supp. at 1300 (emphasis in original).

[15] Moreover, in classification and valuation actions the statute specifically provides that the court may entertain new grounds for its decision that were not placed in issue before the United States Customs Service. 28 U.S.C. § 2638 (1994). This provision is incompatible with the notion that special deference should be given to the agency's construction of the tariff schedules; otherwise, the court's review would have been limited to those legal grounds raised before the agency. The court is aware that *Chevron* deference applies to "an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron,* 467 U.S. at 844. The legislative history to the Omnibus Trade and Competitiveness Act of 1988 does state that the United States Customs Service is responsible for interpreting and applying the Harmonized Tariff System and that Customs takes a lead role in the Customs Cooperation Counsel Harmonized System Committee, particularly with respect to issues regarding United States interpretation and application of the HTS to particular products. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. at 1582. This legislative history, however, cannot limit the clear language of 28 U.S.C. § § 2638, 2640(a)(1), and 2643(b). True enough, if no action is commenced in the CIT, Customs' classification of imported merchandise is final, 19 U.S.C. § 1514(b), and that finality insures that Customs' interpretations of the tariff schedules are not trivial. Under the jurisdiction of the CIT and by operation of 28 U.S.C. § § 2638 (new grounds), 2640(a)(1) (de novo review), and 2643(b) (correct result), the court must review Customs' legal interpretation of the tariff schedules on an equal footing with other competing interpretations.

[16] 28 U.S.C. § 1581 (a), (b). *See also* 19 U.S.C. § 1514(a), 1516(d).

[17] *See* Sections 13 & 14 of the Customs Administrative Act, ch. 407, 26 Stat. 136–137 (1890). The Board of General Appraisers was created by Congress in 1890 "to exercise, under the general direction of the Secretary of the Treasury, such other supervision over *appraisements and classifications,* for duty, of imported merchandise as may be needful *to secure lawful and uniform appraisements and classifications* at the several ports." Section 12, Customs Administrative Act, ch. 407, 26 Stat. 136 (1890).

tion of 28 U.S.C. § § 2638, 2640(a), 2643(b) would require congressional action.

On appeal from a classification case in which the CIT applied *Chevron, Crystal Clear Indus. v. United States,* 843 F. Supp. 721, 725–26 (1994), the Court of Appeals for the Federal Circuit noted that, notwithstanding its affirmance, the appellate decision "did not extend to the suggestion that a routine classification dispute is entitled to special deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Crystal Clear Indus. v. United States,* 44 F.3d 1001, 1002 n.* (1995).

Recently, the Court of Appeals for the Federal Circuit cited *Chevron*'s two-step analysis in a valuation case. *Goodman Mfg., Inc. v. United States,* 69 F.3d 505 (Fed. Cir. 1995). The court held that the statutory presumption of correctness that applies to Customs' decisions[18] is only applicable to Customs' factual determinations. *Id.* at 508. In place of the statutory presumption of correctness, the court discussed *Chevron* to afford a measure of deference to Customs' legal interpretation of the tariff schedules. *Id.* Although the court determined that the statute was ambiguous, the court did not defer to Customs' interpretation. *Id.* at 510. The court held that Customs' construction was "incorrect" and rendered its own interpretation of the statute. *Id.* at 510, 511–512.

The statutory mandate to find the correct result under 28 U.S.C.§ 2643(b) is applicable to both classification and valuation actions.[19] The final outcome in *Goodman* is consistent with the statutory obligation to find the correct result. The end result in *Goodman* that Customs' interpretation of ambiguous statutory and regulatory provisions was *incorrect*—and that the court's interpretation was "the only approach" consistent with the statute and regulation—is consistent with the statutory mandate to find the correct result in classification and valuation cases. *Goodman* demonstrates that the court's statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference to permissible constructions rendered by the United States Customs Service in the valuation or classification context.

The operation of 28 U.S.C. § § 2638, 2640(a), 2643(b); the result in *Goodman;* the sheer weight of past practice and precedent in customs litigation spanning over a century; and the Federal Circuit's statement in *Crystal Clear,* 44 F.3d 1001, 1002 n.* (1995), lead the Court to con-

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[18] *See* 28 U.S.C. § 2639(a)(1) (1994).

[19] *See* H.R. REP. No. 1235, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S.C.C.A.N. 3729 at 3772) ("Subsection (b) has particular impact on civil actions brought pursuant to section 515 or 516 of the Tariff Act of 1930. Under existing law, for example, in a civil action commenced under the court's jurisdiction to entertain cases involving the *classification or valuation* of *merchandise,* if the plaintiff succeeds in demonstrating that the original decision of the Customs Service was incorrect but is unable to establish *the correct classification* or *valuation,* the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or to schedule a retrial or rehearing so that the parties may introduce additional evidence.") (emphasis added).

clude that special *Chevron* deference does not apply in the routine classification case.[20]

II

The classification question before the Court is whether the cobalt alloy powders should be classified under subheading 8105.10.30 as "Unwrought cobalt" or under subheading 8105.10.90 as "Other." Rule 1 of the General Rules of Interpretation of the Harmonized Tariff Schedule provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." HTSUS, Gen. R. Interpr. 1.

Heading 8105.10 contains four types of articles: cobalt mattes and other intermediate products of cobalt metallurgy; unwrought cobalt; waste and scrap; and powders. Congress created only two further subheadings, one for "Unwrought cobalt" and the "Other" or basket provision; there is, therefore, no specific heading or subheading for cobalt powders.[21] Consequently, cobalt powders must either be classified as "Unwrought cobalt" or as "Other."

Plaintiff claims that cobalt alloy powder is classifiable within subheading 8105.10.90, "Other." Subheading 8105.10 lists both "unwrought cobalt" and "powders," and provides inferior subheadings 8105.10.30 for "Unwrought cobalt" and 8105.10.90 for "Other." Plaintiff argues that the drafters intended powder to be included in the "Other" or basket provision, because there is no inferior subheading for "Powder" like there is for "Unwrought cobalt."

Defendant claims that cobalt alloy powder is a "manufactured primary form" similar to the other forms listed in the tariff schedule definition of unwrought and is therefore properly classifiable within the unwrought subheading, 8105.10.30, HTSUS.

Powders are defined in the HTSUS as "Products of which 90 percent or more by weight pass through a sieve having a mesh aperture of 1mm." Note 6(b) to Section XV, HTSUS. Unwrought is defined in the HTSUS as "* * * metal, whether or not refined, in the form of ingots, blocks, lumps, billets, cakes, slabs, pigs, cathodes, anodes, briquettes, cubes, sticks, grains, sponge, pellets, flattened pellets, rounds, rondelles, shot and *similar manufactured primary forms* * * *" Additional U.S. Note 2 to

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[20] The defendant cites *Marubeni America Corp. v. United States*, 915 F. Supp. 413 (1996) and *Lotto U.S.A., Inc. v. United States*, 12 CIT 187 (1988) to support its contention that *Chevron* deference applies to Customs' interpretations of the tariff schedules. Neither case supports this proposition. The court in *Marubeni* held that the *importer's interpretation* of a tariff term was not entitled to deference, *Marubeni*, 915 F Supp. at 418, and stated, "Hence, in light of the foregoing rationale in *Semperit* based on *Jarvis Clark*, holding that a deferential standard is precluded in classification cases, a fortiori a deferential standard in favor of the importer cannot exist." *Id.*

The defendant's reliance on *Lotto* excerpts the following sentence: "Plaintiff's interpretation of the TSUS provision has nothing to recommend it over the approach taken by the government; in such a situation the government's interpretation must prevail." The court in *Lotto*, however, had already concluded that the government's "reasonable and easily understood rule applying the statute seems the best approach." *Lotto*, 12 CIT at 188. This conclusion follows the statutory mandate to find the "correct result." Accordingly, the *Lotto* court's conclusion does not support the defendant's interpretation of that decision.

[21] *Cf.* "Copper powders and flakes" 7406, HTSUS; "nickel powders and flakes" 7504, HTSUS; "aluminum powders and flakes" 7603, HTSUS; "lead powders and flakes" 7804.20, HTSUS; "zinc powders" 7903.90.30, HTSUS; "molybdenum powders" 8102.10. HTSUS.

C. *Domestic Producers:*

1. The Tying Presumption:

Domestic Producers support Commerce's adoption of the tying presumption as a reasonable method of defining the sales denominator for a subsidy recipient that is a multinational producer. Domestic Producers cite with approval Commerce's finding that the presumption is consistent with the intent of the CVD statute as it "facilitates a full offset of countervailable subsidies." (Domestic Producers' Rebuttal Comments in Support of the Final Results of Redetermination Re: Denominator (Domestic Producers' Rebuttal Comments) at 6 (footnote omitted).) A rational connection between known and presumed facts is manifested in part, Domestic Producers assert, by Commerce's observation that "'a government normally would provide a subsidy to a firm with multinational production for domestic purposes.'" *(Id.* at 7 (quoting *Sales Denominator Remand* at 9).)

As to plaintiffs' other objections to the tying presumption, Domestic Producers agree with Commerce that whether equity infusions could be subjected to a tying analysis or to the tying presumption was not an open issue on remand. In the event the Court does consider this issue, Domestic Producers continue, plaintiffs' fungibility and equity arguments are misguided. Domestic Producers reject plaintiffs' analogy of a blood transfusion to describe the effects of equity infusions on a firm, because, Domestic Producers argue, "the flow of resources * * * within a company reflects *choices* by company managers, who divert theoretically fungible funds to specific uses. By comparison, the flow of blood is not subject to decisions; it goes randomly where the veins take it, without regard to corporate managers or government policy." *(Id.* at 11.) Domestic Producers argue that although fungible resources theoretically can be used for anything, this does not mean that resources are likely to be used for everything equally. It is this point that the tying presumption addresses, Domestic Producers continue, as it establishes that "it is appropriate to allocate [subsidies] according to which of the many outcomes made theoretically possible by fungibility is most likely to occur." *(Id.* at 12.) Domestic Producers also suggest plaintiffs' fungibility arguments are inconsistent as BS plc "argues that because of fungibility, no subsidy can ever be tied to any particular type of production," *(id.* (footnote omitted)), while Usinor Sacilor "tries to avoid dragging down all tying by insisting that equity infusions are somehow special" and cannot be tied, *(id.* at 14).[27]

2. Application of the Tying Presumption to Record Evidence:

a. French Final Determination:

Usinor Sacilor has misapplied the law, Domestic Producers argue, when they argue *Creswell* requires Commerce to prove Usinor Sacilor's

[27] Domestic Producers also oppose plaintiffs' attack on the general principles Commerce erected to apply the presumption. These challenges are without merit, Domestic Producers charge, and should be rejected. (*See* Domestic Producers' Rebuttal Comments at 17–21.)

rebuttal evidence was "'neither accurate nor sufficient.'" *(Id.* at 22 (quoting Usinor Sacilor's Comments at 22 (further citation omitted)).) Domestic Producers contend that in *Creswell*, the CAFC "held that the evidentiary burden of production shifted back to the Department precisely *because* the respondents in that case had presented evidence sufficient to rebut the presumption. Here, Foreign Producers failed to rebut the presumption; accordingly, the burden did not shift to the Department." *(Id.* at 22 (footnote omitted).)

Domestic Producers dispute Usinor Sacilor's charge that Commerce ignored rebuttal evidence. Domestic Producers cite to passages in the *Sales Denominator Remand* where Commerce discussed evidence that Usinor Sacilor claims Commerce ignored. In a point by point examination of certain record evidence, Domestic Producers discount Usinor Sacilor's interpretations of the evidence, and claim Commerce properly found Usinor Sacilor failed to rebut the tying presumption. (*See id.* at 23–27.)

b. British Final Determination:

Domestic Producers agree with Commerce that evidence showing the absence of any explicit restrictions on the use of section 18(1) funds, references to foreign operations in BSC's annual reports, and the allegation that HMG knew BSC was expending money on non-UK activities is not sufficient to rebut the tying presumption. Domestic Producers also reject BS plc's argument that Commerce "improperly discounted the evidentiary value of corporate plans and budget forecasts which reference 'fixed assets abroad.'" *(Id.* at 29 (citing BS plc's Comments at 6).) "The category of capital requirements listed as 'fixed assets abroad,'" Domestic Producers argue, "also included entirely domestic matters, such as 'net investment in UK companies, net investment in long and medium-term financial assets and changes in working capital.'" *(Id.* (footnote omitted).) Thus, Domestic Producers maintain, this evidence is inconclusive and Commerce properly found it did not rebut the tying presumption. Finally, evidence of a 1978/79 British Steel Corporation (International) Ltd. annual report allegedly demonstrating a BSC foreign subsidiary suffered losses is insufficient to rebut the tying presumption, Domestic Producers argue, as "nothing in that report gave any indication whatsoever that any subsidy funds were likely to be used to offset those losses." *(Id.* at 30.)

DISCUSSION

A. *The Tying Inquiry:*

The Court first considers the issue of Commerce's resort to a tying inquiry when investigating firms with multinational production. Because the language of the CVD statute is silent on this issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). In its review of the agency's answer, "[t]hough a court may reject an agency interpretation that contravenes clearly discernible leg-

islative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.'" *American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted), *quoted in Grupo Indus. Camesa v. United States*, 853 F. Supp. 440, 442 (CIT 1994). Plaintiffs' arguments that Commerce's tying analysis is inconsistent with the fungibility of money principle do not persuade the Court to reject Commerce's resort to a tying inquiry as an unreasonable interpretation of the CVD statute. The legislative history to the Trade Agreements Act of 1979, Pub. L. No. 96–39, 93 Stat. 144 (1979), makes clear Commerce is required to allocate subsidies over products that have benefited from the subsidies.[28] To effect this allocation, Commerce must ascertain which products have benefited from countervailable subsidies. Commerce then must allocate countervailing duties over such products in a manner that reasonably reflects the extent to which the products have benefited from the subsidies.

It is consistent with Congressional intent for Commerce to reject the view that subsidies bestowed on a company are equally beneficial to all products made by a company in all cases. As Commerce notes in the *Sales Denominator Remand*, if the fungibility of money principle were applied without exception, the result would be "'to allocate all benefits, regardless of their intent or effect, over a company's total sales. This * * * raises the specter of having to dilute benefits (perhaps to *de minimis* levels) that we know are tied to products under investigation.'" *Sales Denominator Remand* at 40 (quoting *Industrial Nitrocellulose*, 52 Fed. Reg. at 835). Therefore, Commerce's traditional tying analysis carves out exceptions to the fungibility of money principle in certain circumstances.[29] As Commerce has explained:

> If Congress had intended that we universally apply the fungibility concept, we would have to countervail export subsidies on sales to countries other than the United States, allocate export subsidies on U.S. sales over total sales instead of over only export sales, and dilute benefits tied to a product under investigation by allocating them over total sales.

Industrial Nitrocellulose from France, 51 Fed. Reg. 5386, 5387 (Dep't Comm. 1986) (prelim. admin. review). This view is in accord with numerous investigations by Commerce analyzing the relationship between a tying inquiry and the fungibility of money principle. *See Sales Denominator Remand* at 38–40 (citations omitted). Accordingly, Commerce's explanation that the tying inquiry made in these investigations exists as an exception to the fungibility of money principle is sustained.

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[28] *See* S. Rep. No. 249 at 85, reprinted in 1979 U.S.C.C.A.N. at 471 ("Reasonable methods of allocating the value of * * * subsidies over the production or exportation of the products benefiting from the subsidy must be used."); H.R. Rep. No. 317, 96th Cong. 1st Sess. 75 (1979) ("[I]n calculating the *ad valorem* effect of non-recurring subsidy grants or loans, reasonable methods of allocating the value of such subsidies over the production or exportation of products benefitting from them will be used.").

[29] Prior to *France Bismuth*, Commerce made two exceptions to the general principle of the fungibility of money: (1) where a domestic subsidy is tied to a particular product or products; and (2) where an export subsidy is tied to a particular market. *General Issues Appendix*, 58 Fed. Reg. at 37,234 (citing 54 Fed. Reg. 23,366, 23,383–84 (Dep't Comm. 1989) (to be codified at 19 C.F.R. § 355.47(a), (b)) (proposed May 31, 1989)).

The Court also notes that Commerce's resort to a tying inquiry in *France Bismuth*, which involved some of the same subsidies at issue in this proceeding, has been upheld by the Court:

> [T]he court finds that Commerce has articulated a reasoned basis for analyzing this issue via a "tying" inquiry * * *. [T]o the extent that Commerce's methodology does represent a departure from past practice, the court finds that Commerce's decision to engage in a "tying" inquiry was based upon reasoned analysis * * *. This aspect of [*France Bismuth*] is therefore sustained.

Usinor Sacilor, 893 F. Supp. at 1139 (citation and footnote omitted). Plaintiffs have raised no persuasive arguments undermining the Court's holding in *Usinor Sacilor*. In light of the above, the Court holds Commerce resort to a tying inquiry in cases where a multinational firm's sales include non-domestic production is based on substantial evidence and is otherwise in accordance with law.

B. *The Adoption of the Tying Presumption:*

In discussing the adoption of the tying presumption in *British Steel*, this Court observed "[o]n the basis of the record evidence produced thus far in this action, it appears Commerce has sufficiently explained its adoption of the tying presumption." *British Steel*, 879 F. Supp. at 1316. The Court went on to state, however, it was "premature for the Court to decide whether Commerce has provided a reasoned analysis for adopting the tying presumption because interested parties had neither notice of the new presumption nor the opportunity to present evidence to rebut the presumption." *Id.* In compliance with the Court's order, Commerce afforded interested parties notice and the opportunity to comment on the tying presumption and to present evidence to rebut the presumption. After the parties' full participation on remand, Commerce affirmed its decision to adopt the tying presumption and subsequently applied the presumption to the evidence in these investigations.

Although an administrative agency has the power to create a presumption, the presumption "must rest on a sound factual connection between the proved and inferred facts." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979); *see also United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) ("Presumptions may, of course, be established both by legislative bodies and by administrative agencies, but their validity depends as a general rule upon a rational nexus between the proven facts and the presumed facts.") (citing *McCormick on Evidence* § 344 at 969 (3rd ed. 1984)) (further citations omitted). Additionally, "courts have the duty to review the [agency's] presumptions both 'for consistency with the [statute], and for rationality.'" *Baptist Hosp., Inc.*, 442 U.S. at 787 (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978)); *see also Rhone Poulenc, Inc. v. United States*, 8 Fed. Cir. (T) 61, 67, 899 F.2d 1185, 1191 (1990) (finding Commerce's "presumption implements the basic purpose of the statute"). In sum, an agency presumption must be both consistent with the intent of

the statute and based upon a rational connection between the facts proven and the facts presumed.

The Court in *British Steel* found "Commerce's explanation that its tying presumption is consistent with the intent of the relevant statute because the presumption aids Commerce in determining the appropriate denominator appears reasonable on its face." *British Steel*, 879 F. Supp. at 1316. Plaintiffs in this proceeding have raised no arguments that would lead the Court to waver from this finding. The purpose of countervailing duties is "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." *Zenith Radio Corp.*, 437 U.S. at 456 (citations omitted). In this vein, Congress directed the administering agency that "in the case of nonrecurring subsidy grants or loans * * *. [r]easonable methods of allocating the value of such subsidies *over the production or exportation of the products benefiting from the subsidy* must be used." S. Rep. No. 249 at 85, *reprinted in* 1979 U.S.C.C.A.N. at 471 (emphasis added). Commerce is not required, of course, to trace the actual effects of subsidies, and therefore Commerce cannot know with certainty the actual value of products benefitting from subsidies. The tying presumption does establish, however, a reasonable inference that subsidies to companies with both domestic and foreign production will *likely benefit* the company's domestic production. *See Sales Denominator Remand* at 53 ("[T]he use of the presumption provides the best means for identifying the *likely beneficiaries* of the subsidy benefits * * *.") (emphasis added). This inference is consistent with the intent of the statute directing Commerce to "allocat[e] the value of * * * subsidies over the production or exportation of the products benefiting from the subsidy."

The Court also finds the tying presumption is based upon a rational connection between the facts proven and the facts presumed. Commerce observed:

> [I]t is reasonable to presume that the government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purposes of supporting, assisting or encouraging domestic manufacturing or production and related activities (including, for example, social policy activities such as the employment of its people). Conversely, that same government would not normally be motivated to promote, at what would be considerable cost to its own taxpayers, manufacturing or production or higher employment in foreign countries.

General Issues Appendix, 58 Fed. Reg. at 37,231; *see also Sales Denominator Remand* at 10. Usinor Sacilor's complaint that this rationale "has no valid foundation" is not well-taken. First, as the Court observed in *British Steel*, Commerce has extensive experience identifying and allocating equity infusions, grants, and other subsidies in CVD investigations. *British Steel*, 879 F. Supp. at 1316. Second, Usinor Sacilor's critique that Commerce's rationale is at variance with the analysis contained in certain economic texts misses the point. Commerce is not

required to advance a methodology that is the most reasonable, nor the most economically rational—it need only set forth a methodology that is consistent with the intent of the statute and one that is based on substantial evidence and is otherwise in accordance with law. *See Ipsco, Inc. v. United States*, 12 CIT 359, 364–65, 687 F. Supp. 614, 620 (1988) (holding Commerce's interpretation of CVD statute "need not be the most reasonable interpretation, or the only reasonable interpretation") (citing *Zenith Radio Corp.*, 437 U.S. at 450). For the Court to find that because the rationale underpinning the tying presumption is not in accord with certain economic teachings the tying presumption is unlawful would distort the standard of review this Court is charged with applying. The Court finds Commerce has advanced a reasoned analysis for erecting the tying presumption in these investigations. Accordingly, the Court holds Commerce's adoption of the tying presumption to assist the agency in making its factual determination of tying in cases where a multinational firm's sales include non-domestic production is based on substantial evidence and is otherwise in accordance with law.

C. *Application of the Tying Presumption to Record Evidence:*

Usinor Sacilor's arguments challenging two of the general principles Commerce erected in applying the tying presumption to the record evidence in these investigations—namely, Commerce's separate examination of each subsidy and Commerce's decision not to consider evidence of subsequent events tending to demonstrate the actual effects or uses of the subsidies at issue—simply present alternative perspectives on how Commerce should apply the tying presumption. As part and parcel of the tying presumption itself, these general principles remain within the discretion of the agency to adopt and will not be disturbed absent a showing they are not based on substantial evidence or are not otherwise in accordance with law. The Court agrees "government approvals and conditions for subsidy bestowals * * * may change from one year to the next," thus it is reasonable for Commerce to examine each subsidy separately in the year bestowed. The principle that Commerce will not consider evidence of subsequent events to demonstrate the actual effects of subsidies is consistent with the agency's traditional tying practice. *See Usinor Sacilor*, 893 F. Supp. at 1141. Usinor Sacilor's attempt to challenge this practice is not persuasive. Commerce's decision to examine subsidies separately in the year bestowed and to ignore evidence of subsequent events tending to demonstrate the actual effects or uses of subsidies are both reasonable exercises of the agency's discretion in administering the CVD statute.

Usinor Sacilor's complaints against Commerce's application of the tying presumption in this case have no merit. The tying presumption is a *rebuttable* presumption; Commerce described a variety of evidence that may rebut the presumption including a "catch-all" category for "any other evidence addressing the likely beneficiaries of the subsidy." Plaintiffs' argument that Commerce precluded all evidence of likely effects other than the intent of the government is not borne out by the

record in this proceeding.[30] Commerce expressly stated that no one type of evidence is decisive and that the agency will weigh the rebuttal evidence presented on a case by case basis. Furthermore, once a party presents evidence "tending to show" that the subsidies at issue are not tied to domestic production, the presumption is rebutted. That is, the party must present enough evidence so that a reasonable fact-finder could be convinced of the non-existence of the presumed fact—that the subsidies at issue are tied to the recipient firm's domestic production. *See Sales Denominator Remand* at 15–16. Contrary to Usinor Sacilor's contention that Commerce has set the burden of producing rebuttal evidence "so high that persons in the position of respondents cannot meet it," the Court finds both the type and quantum of evidence necessary to rebut the tying presumption are reasonable. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) (citations omitted).

1. *French Final Determination:*

None of the arguments advanced by Usinor Sacilor convince the Court that Commerce erred in finding Usinor Sacilor failed to rebut the tying presumption. Commerce duly considered record evidence Usinor Sacilor advanced to rebut the presumption and concluded it was insufficient. Usinor Sacilor's charge that Commerce "ignor[ed] or steadfastly misinterpret[ed] record evidence" is contradicted by a plain reading of the *Sales Denominator Remand*. For example, Usinor Sacilor contends Commerce failed to consider that the GOF's principal intention in granting certain subsidies was to improve the company's weak financial condition and to cover the company's accumulated consolidated losses, both domestic and foreign. (*See* Usinor Sacilor's Comments at 18 (footnote omitted).) In the *Sales Denominator Remand*, however, Commerce did consider such evidence finding that it did not tend to show how or why any foreign subsidiaries likely would benefit from the subsidies provided to Usinor Sacilor. *See Sales Denominator Remand* at 19–22, 68–72. Similarly, Usinor Sacilor's claim that Commerce ignored evidence concerning the 1986 debt-to-equity conversions is belied by Commerce's discussion of such evidence in the *Sales Denominator Remand* at pages 74–78. As the fact-finder in these complex investigations, Commerce is charged with surveying the record and making a determination; the agency's decision need not be the most correct, nor the one the Court would have reached had the Court considered the evidence *de novo*.[31] The Court only need be assured the decision reached by Com-

[30] *See Sales Denominator Remand* at 35–45. The Court agrees with Commerce that a government's intent or purpose in bestowing subsidies may be some evidence of the likely beneficiaries of subsidies, and thus may serve as evidence rebutting the tying presumption. Intent may be relevant to how subsidy benefits are allocated when applying the principles of tying. The intent of the subsidizing government, however, is not dispositive as to whether subsidies were in fact bestowed or whether such subsidies exist. *See British Steel Corp. v. United States*, 9 CIT 85, 96, 605 F. Supp. 286, 294 (1985) (concluding the government's domestic purposes in providing funds "are not controlling of the question of whether such largess constitutes countervailable subsidies.")

[31] *See Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22 (1st Cir.) ("[T]he court may not substitute its judgment for that of [Commerce] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice has the matter been before it *de novo* * * *.'") (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)), *cert. denied*, 464 U.S. 892 (1983), quoted in *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987).

merce is based on substantial evidence and is otherwise in accordance with law. The Court holds Commerce's determination that Usinor Sacilor failed to rebut the tying presumption as to the conversion of PACS and FIS bonds into equity in 1981, 1986, and 1988, and as to the grants given in the form of shareholders' advances from 1982 through 1986 is based on substantial evidence and is otherwise in accordance with law.

2. *British Final Determination:*

The Court holds Commerce's determination that BS plc failed to rebut the tying presumption for subsidies provided pursuant to equity infusions made under section 18(1) of the Iron and Steel Acts of 1975 and 1982 in fiscal years 1977/78 through 1985/86, with the exception of the equity infusions in fiscal year 1984/85, is based on substantial evidence and is otherwise in accordance with law. BS plc fails to advance any convincing arguments otherwise. For example, BS plc contends evidence showing HMG knew the company was expending cash on non-UK activities during the period it was receiving subsidies and that HMG failed to advise the company that subsides could not be used for that purpose is sufficient evidence to rebut the presumption. Commerce found that such evidence alone could not rebut the tying presumption because it establishes little more than that HMG provided subsidies to the company and that the company was engaged in multinational production at that time. The Court cannot say Commerce's interpretation of the evidence is unreasonable. BS plc merely raises a conflicting view of the evidence, which alone does not undermine Commerce's determination. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (citations omitted).

The Court also sustains Commerce's decision that BS plc provided sufficient evidence to rebut the presumption that subsidies provided under section 18(1) for fiscal year 1984/85 were tied to domestic production. BS plc's argument that Commerce should have found the presumption was rebutted for the entire period the company received subsidies is unavailing, as the Court has upheld Commerce's general principle of examining each subsidy at issue separately in the year bestowed.

In conclusion, the Court holds the *Sales Denominator Remand* setting forth a rebuttable presumption that a subsidy provided by the government of the country under investigation is tied to the domestic production of the recipient where the recipient is a multinational firm whose sales include non-domestic production and applying the tying presumption to the *French Final Determination* and the *British Final Determination*, is sustained as based on substantial evidence and otherwise in accordance with law.

CONCLUSION

After considering Commerce's *Allocation Remand* and the comments of all parties, the Court holds the *Allocation Remand*, setting forth a

method of determining the allocation period over which to allocate the benefits of nonrecurring subsidies using the company-specific average useful life of renewable physical assets and applying the allocation methodology to the *French Final Determination* and the *British Final Determination*, is sustained as based on substantial evidence and otherwise in accordance with law.

After considering Commerce's *Sales Denominator Remand* and the comments of all parties, the Court holds the *Sales Denominator Remand*, setting forth a rebuttable presumption that a subsidy provided by the government of the country under investigation is tied to the domestic production of the recipient where the recipient is a multinational firm whose sales include non-domestic production and applying the tying presumption to the *French Final Determination* and the *British Final Determination*, is sustained as based on substantial evidence and otherwise in accordance with law.

British Steel plc. v. United States, Consol. Court No. 93–09–00550–CVD, consisting of *British Steel plc v. United States*, Court No. 93–09–00550–CVD and *Geneva Steel, et al. v. United States*, Court No. 93–09–00572–CVD, is hereby dismissed.[32]

(Slip Op. 96–89)

CARNIVAL CRUISE LINES, INC., HAL ANTILLEN, N.V., HAL SHIPPING LTD., AND WIND SURF LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–10–00691

[Plaintiffs move for summary judgment on Count IV of their complaint, alleging that certain provisions of the Harbor Maintenance Tax (26 U.S.C. §§ 4461–4462) are not severable from those portions which have been held to be unconstitutional. *Held:* The challenged provisions are severable; motion for summary judgment denied.]

(Dated June 6, 1996)

Paul, Weiss, Rifkind, Wharton & Garrison (Robert E. Montgomery, Jr., Robert P. Parker, Swati Agrawal) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(John K. Lapiana)* for defendant.

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[32] Notwithstanding the dismissal of *British Steel plc. v. United States*, Consol. Court No. 93–09–00550–CVD, in the instant opinion and accompanying judgment order, the Court will continue to use *British Steel plc. v. United States*, Consol. Court No. 93–09–00550–CVD, as the identifier of this joint proceeding. This will not interfere, however, with the ability of the parties in *British Steel plc. v. United States*, Consol. Court No. 93–09–00550–CVD, consisting of *British Steel plc v. United States*, Court No. 93–09–00550–CVD and *Geneva Steel, et al. v. United States*, Court No. 93–09–00572–CVD, to appeal all issues of allocation and sales denominator they have challenged in the course of this proceeding. *Cf. British Steel plc*, Slip Op. 96–60 at 23 n.14.

The Court also notes there remain certain country-specific issues pending in *Inland Steel Industries, Inc., et al. v. United States*, Consol. Court No. 93–09–00567–CVD. Accordingly, the Court will issue its final judgment in *Inland Steel Industries, Inc., et al. v. United States*, Consol. Court No. 93–09–00567–CVD, at the time of disposition of those country-specific issues.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge:* In this consolidated case, this Court recently granted Plaintiffs' motion for leave to amend its complaint to include a new claim which arose as a result of the Court's recent decision in *United States Shoe Corp. v United States*, 19 CIT ___, 907 F. Supp. 408 (1995), *appeal docketed*, No. 96–1210 (Fed. Cir. Feb. 14, 1996). In that case a three judge panel of the Court held that the Harbor Maintenance Tax (26 U.S.C. §§ 4461–4462, hereinafter "HMT") is unconstitutional as it applies to exports, as it violates the Export Clause of the United States Constitution, Article I, Section 9, Clause 5. Plaintiffs' original complaint related to specific sections of the HMT not dealing with exports; Plaintiffs' (second) amended complaint now claims that the provisions of the HMT which relate to exports are not severable from the remaining portions of the HMT, thus the entire HMT is unenforceable. Pl.s' Second Amended Complaint, Count IV, para. 43. Plaintiffs therefore claim the HMT as it relates to their operations is unenforceable. Pl.s' Second Amended Complaint, Count IV, para. 44.

The issue raised by Plaintiffs' amended complaint is whether those portions of the HMT held unconstitutional by this Court, namely the HMT "as it applies to exports," may be severed from those portions of the HMT that deal with Plaintiffs' passenger operations. The Court finds this issue to be solely one of law that may now be addressed.

The principles governing the issue of severability of unconstitutional portions of a statute from the remainder of that statute were summarized by the Supreme Court in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). In that case, the Court considered whether an unconstitutional legislative veto provision of the Employee Protection Program (enacted as section 43 of the Airline Deregulation Act of 1978) rendered the entire Employee Protection Program unconstitutional. The Court set forth the following:

> "[A] court should refrain from invalidating more of the statute than is necessary * * *. '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co. v. Guitierrez*, 215 U.S. 87, 96 (1909). The standard for determining the severability of an unconstitutional provision is well established: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*per curiam*), quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Accord: *Regan v. Time, Inc.*, 468 U.S., at 653; *INS v. Chadha*, 462 U.S., at 931–932; *United States v. Jackson*, 390 U.S. 570, 585 (1968).
>
> Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently. *See,*

> *e.g., Hill v. Wallace,* 259 U.S. 44, 70–72 (1922) (Future Trading Act held nonseverable because valid and invalid provisions so intertwined that the Court would have to rewrite the law to allow it to stand) * * *.
>
> The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress * * *. The final test, for legislative vetoes as well as for other provisions, is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.
>
> The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. See *INS v. Chadha,* 462 U.S., at 932; *Champlin Refining Co. v. Corporation Comm'n of Oklahoma,* 286 U.S., at 235. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. In the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability. *See Tilton v. Richardson,* 403 U.S. 672, 684 (1971) (plurality opinion); *United States v. Jackson,* 390 U.S., at 585, n. 27.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684–86 (1987) (footnotes omitted). The Supreme Court examined the language and structure of the statute, as well as the legislative history in determining that Congress intended for severability of the legislative veto provision. *Id.,* 480 U.S. at 697.

The Court first turns to the question of whether the HMT, absent those provisions which violate the Export Clause of the Constitution, is capable of functioning independently.

The HMT was enacted as a means of funding development and maintenance of the nation's ports and waterways. The monies collected under the HMT are deposited into a designated trust fund from which monies are appropriated for specific projects. In addition to the HMT, Congress redesignated a previously enacted inland waterways tax and trust fund as part of the revenue provisions of the Water Resources Development Act of 1986, Pub. L. No. 96–622, 100 Stat. 4082 ("WRDA"). The HMT and the inland waterways tax, together with their corresponding trust funds, comprise Title XIV of the WRDA. Title XIV may also be referred to as the Harbor Maintenance Revenue Act of 1986 ("HMRA").

The HMT operates in a straightforward manner. It begins by imposing a tax on "any port use." § 4461(a). Port use is defined as "(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from a commercial vessel at a port." § 4462(a)(1). Commercial cargo is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire."

§ 4462(a)(3). Regulations made pursuant to statutory powers granted the Secretary of the Treasury, § 4462(i), further define commercial cargo as "* * * merchandise transported on a commercial vessel and passengers transported for compensation or hire. Whenever the term 'cargo' is used, it means merchandise, but not passengers." 19 C.F.R. § 24.24(b)(2). The amount of tax is set according to the value of commercial cargo. § 4461(b). Section 4461(c) sets the liability and time of imposition of tax. Under section 4461(c)(1), liability is imposed on three categories of taxpayers, as follows:

> (A) in the case of cargo entering the United States, the importer,
> (B) in the case of cargo to be exported from the United States, the exporter, or
> (C) in any other case, the shipper.

Under section 4461(c)(2), the time of liability is, except as provided by regulations, as follows:

> (A) in the case of cargo to be exported from the United States, at the time of loading, and
> (B) in any other case, at the time of unloading.

19 C.F.R. § 24.24(e)(4)(i) sets the time and place of liability of passengers to be "* * * when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee * * *. The vessel operator on each cruise is liable only once for the port use fee for each passenger."

The only portions of the HMT which explicitly address exports, and thus are unconstitutional, are section 4461(c)(1)(B), which is a separate and distinct category of liability that operates independently of the categories of liability dealing with "imports" and "other cases" (§§ 4461(c)(1)(A) and (C)); and section 4461(c)(2)(A), a provision which sets the time of liability. In removing these "export" provisions, the statute still imposes liability on the remaining categories of liability other than exports. The HMT can still be imposed on any port use except for loading of commercial cargo [for export]. (§ 4461(a)(B)). Ports can still be "used," as commercial cargo can still be "unloaded." (§ 4461(a)(B)). The time of liability can still be "at the time of unloading." (§ 4461(c)(2)(B)). The party liable for payment of the tax in the case of cargo entering the United States can still be the importer, (§ 4461(c)(1)(A)); and in any other case [but for exports and imports], the party liable can still be the shipper. (§ 4461(c)(1)(C)). Thus, neither of the "export" provisions are essential to the functioning of the statute in relation to the remaining categories of liability for port use. The HMT is therefore capable of functioning independently of the invalid "export" provisions.

The Court now turns to the question of whether the remaining statute, absent the "export" provisions held invalid, is legislation Congress would not have enacted.

Plaintiffs question whether the severability clause applies to specific provisions of the HMRA by pointing out that the severability clause was

included under a separate title of the WRDA (Title IX), and not part of what Plaintiffs call the "free-standing" HMRA. Pl.s' Br. at 11. Plaintiffs also point out that Title IX is "a repository for the various miscellaneous provisions in the statute." *Id.* at 12. Furthermore, they argue that the legislative history of the WRDA in general, and the severability clause in particular, indicate that Congress was only concerned that the possible unconstitutionality of the tax on exports not jeopardize the entire WRDA. *Id.* at 12–15. Plaintiffs also argue that the sparse legislative history of this provision provides no indication that Congress intended it to apply to specific provisions of the HMRA, and that it is a mere formality. *Id.* at 12. Thus, Plaintiffs argue, the severability clause provides "absolutely no support for the preservation of the non-export provisions of the port use tax following *U.S. Shoe*." *Id.*

The Court disagrees. Plaintiffs in essence are contending that by the structure of the WRDA, Congress did not intend the severability clause to apply to a specific provision (tax on exports), but to a larger, more general provision (the HMT), but not to a larger, even more general provision (the HMRA (Title XIV of the WRDA)), if it applies at all; and that by the history of the WRDA, Congress was concerned that the tax on exports would jeopardize the entire WRDA, so it included a severability clause in the WRDA to ensure that the tax on exports could be severed from the remaining provisions of the statute, thereby taking those remaining provisions of the WRDA out of jeopardy; but that the severability clause is to be applied so that the remaining valid provisions of the HMT would be severed from the WRDA as well. The Court finds the logic of these arguments untenable.

The Court begins with the language of the severability clause, as that is the foremost expression of Congressional intent. *Connecticut Nat. Bank. v. Germain*, 503 U.S. 249, 253–54 (1992). The WRDA contains a severability clause which states as follows:

> If any provision of this Act or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

WRDA § 949, 33 U.S.C. § 2304 (1988). The inclusion of such a provision creates the presumption that Congress did not intend the validity of the WRDA to depend upon the validity of the constitutionally offensive provision—in this case, those portions of the HMT dealing with exports. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–86 (1987) (citing *INS v. Chadha*, 462 U.S. 919, 932 (1983)). The severability clause clearly indicates that Congress intended, in the event a provision of the statute is not valid as it applies to a person or circumstance, that such provision would still be valid as to other persons or circumstances. Thus, the language of the severability clause readily accommodates problems of unconstitutionality with all or a portion of the HMT. The HMT specifically sets forth the persons liable for payment of the port use tax, and the circumstances under which payment is to be made. Thus, it appears

Congress intended the severability clause to apply to the HMT, and that the inapplicability of the port use tax to exports shall not affect applicability of the HMT to other persons or circumstances provided for in the HMT, or the WRDA in general.

The structure of the WRDA also favors severability of the tax on exports only. The severability clause is included under Title IX of the WRDA, entitled "General Provisions." The HMT is included under Title XIV of the WRDA, entitled "Revenue Provisions," but may be cited as the Harbor Maintenance Revenue Act of 1986. Harbor Maintenance Revenue Act of 1986, P.L. 99–662, Title XIV, § 1401, 100 Stat. 4266 (1986). Thus, Plaintiffs' characterizations of the HMRA aside, both provisions are part of, and not separate from the WRDA. Moreover, the placement of the severability clause within the general provisions of the WRDA indicates that Congress intended these provisions, including the severability clause, to apply to all of the WRDA, not just the provisions within Title IX. These general provisions, while they might be miscellaneous in nature, have applicability to various provisions throughout the statute, as indicated by titles such as "Annual Obligation Ceilings (§ 901)," "Maximum Cost of Projects (§ 902)," or "Review of Cost Effectiveness of Design (§ 911)." Thus, the structure of the WRDA does not indicate that Congress intended for the severability clause not to apply to specific revenue provisions of the WRDA. It does not indicate that Congress intended the validity of the WRDA to depend upon the validity of the export tax. Nor does the structure indicate that the validity of the HMT or the HMRA depends upon the validity of the export tax.

Plaintiffs argument that the sparse legislative history of the severability clause provides no indication that Congress intended it to apply to specific provisions of the HMRA attempts to shift the presumption against severability. Given a severability clause, the burden is not to demonstrate that Congress did intend to provide for severability, but to demonstrate that Congress did not intend to provide for severability. For severability not to apply, the history, language and structure of the WRDA against severability must be strong. Absent strong evidence against severability, the presumption is that Congress intended any offensive provision to be severed from those which are valid. *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 686.

The legislative history reveals that four committees of the House of Representatives (Public Works and Transportation, Interior and Insular Affairs, Ways and Means, and Merchant Marine and Fisheries) considered the House version of the bill, H.R. 6, 99th Cong., 1st Sess. (1985); two committees of the Senate (Environment and Public Works, and Finance) considered the Senate version of the bill S. 1567, 99th Cong., 1st Sess. (1985); and a conference committee of the House and Senate reconciled the different versions of the bill before passage.

In the House, Public Works and Transportation was first to report the bill, with amendments, on August 1, 1985.[1] Interior and Insular Affairs favorably reported the bill, with amendments, on September 16, 1985, and recommended passage.[2] Ways and Means favorably reported the bill, with amendments, on September 23, 1985, and recommended passage.[3] Merchant Marine and Fisheries ("Merchant Marine") also favorably reported the bill with amendments on September 23, and also recommended passage.[4]

In the Senate, Environment and Public Works favorably reported an original bill (S. 1567) on August 1, 1985, and recommended passage.[5] Finance favorably reported the bill, with an amendment, and recommended passage on January 8, 1986.[6]

The Committee of Conference recommended a reconciled version of the bills to the House and Senate on October 17, 1986.[7]

Of the House and Senate reports, only one committee included a severability clause in its version of the bill. Merchant Marine raised a concern about the constitutionality of the tax on exports. To prevent that tax from jeopardizing the remaining provisions of the HMT (§ 110 of the Merchant Marine report), Merchant Marine added a severability clause (§ 116) which set forth:

> If section 110 of this title is invalid, all valid parts that are severable from section 110 remain in effect. *If section 110 of this title is invalid in one or more of its applications, section 110 remains in effect in all valid applications that are severable from the invalid applications.*

H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 4, at 13 (1985) (emphasis added). The Committee provided the following explanation for section 116:

> Lastly, Mr. Bateman's amendment [section 116] would provide for severability should any of the provisions of section 110 be found unconstitutional or invalid for other reasons. The concern of the Committee and the subject of the amendment was, for example, that the constitutional arguments that had been made against imposing a tax *on exports* might result in the legislation being declared invalid and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

Id. at 30 (emphasis added). The Committee of Conference reported the bill as it essentially was enacted, with the severability clause set forth as section 949 of Title IX. H.R. Conf.. Rep. No. 1013, 99th Cong., 2d Sess., at 123 (1986). The Conference Committee did not explain why it included the provision, or why the provision was placed under Title IX.

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[1] H.R. Rep. No. 251, 99th Cong., 1st Sess., pt .1 (1985).
[2] H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 2 (1985).
[3] H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 3 (1985).
[4] H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 4 (1985).
[5] S. Rep. No. 126, 99th Cong., 1st Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639.
[6] S. Rep. No. 228, 99th Cong., 1st Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 6705.
[7] *Water Resources Development Act of 1986*, H.R. Conf. Rep. No. 1013, 99th Cong., 2d Sess. (1986).

Plaintiffs argue that Merchant Marine was concerned about severability, "but *only* to the extent that the questionable constitutionality of the tax might affect the rest of the legislation." Pl.s' Br. at 14 (emphasis in original). Plaintiffs contend that "the severability clause was directed solely at the port use tax to make clear that the comprehensive reforms of the U.S. water policy on which Congress had worked for a number of years would not be drawn into question by an Export Clause challenge." *Id.* Plaintiffs further argue that this view is supported by Ways and Means' decision not to include a severability clause in its bill, but rather to report a "free-standing" HMRA. *Id.* at 15. Plaintiffs argue that by reporting a separate "free-standing" title, Merchant Marine's concern that an invalid port use tax could jeopardize the entire WRDA was minimized. *Id.*

Plaintiffs appear to be correct inasmuch as Merchant Marine was concerned about the possible invalidity of the tax, and that Merchant Marine was concerned that the tax might affect the remainder of the statute. However, Merchant Marine's specific concern over the validity of the tax was that a tax on exports violated the Export Clause.[8] The Committee therefore added the severability provision (§ 116) which clearly indicates that it intended that all valid applications of section 110 remain in effect apart from the invalid applications. In this instance, the invalid application of section 110 (the port use tax) would be the tax on exports. Thus it appears Merchant Marine intended the tax on exports to be severed from the remaining valid applications of the port use tax, rather than severing the port use tax in its entirety.

Plaintiffs' argument that the Ways and Means Committee decision not to include a severability clause but rather to report a "free-standing" bill to minimize concerns about an unconstitutional port use tax jeopardizing the entire WRDA finds no support in the legislative history. It is clear that the revenue portion reported by Ways and Means was to be under a specific title, but that it was to be part of the WRDA. It does not appear that Ways and Means considered Merchant Marine's report, as both reports were issued the same day. Moreover, there is no explanation provided by Ways and Means that sets forth any such reasoning.

From the committee reports there is no doubt that Congress struggled with the question of what would be the best basis for taxing port users. The debate largely centered on a tonnage basis versus an *ad valorem* basis, with a tonnage tax levying its burden more on bulk cargoes, and an *ad valorem* tax levying its burden more on containerized manufactured goods. *See, e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6646–47; S. Rep. No. 228, 99th Cong., 1st Sess. 5–6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6710. It is also clear that Congress desired an equitable and uniform tax. *Id.* What is not clear, however, is how invalidating exports alone would

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[8] *See* H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 4, 23–24 (1985). *See also, id.*, at 34: "Cognizant of the debate which could be legally joined over the validity of a fee or tax on cargo, *particularly as applied to exports*, the Committee has added a new section 116 severability provision to H.R. 6." (emphasis added).

generate inequities that Congress attempted to avoid in selecting one basis over another. It is also not clear that Congress intended to eliminate the whole tax in the event the tax on exports were held invalid.

Without more support, the Court feels it unwise to speculate as to Congress' intent in removing severability from the revenue provisions—as set forth in the Merchant Marine Report, to the general provisions of the WRDA—as set forth in the Conference Report and in the statute. Therefore, the Court will not adopt Plaintiffs' interpretation of the legislative history of the severability clause. In sum, the legislative history of the severability clause and of the HMT does not provide strong evidence that Congress intended the entire tax to be invalidated should a portion of it be invalidated. Congress intended to tax "any port use." However, Congress' powers to tax are prescribed by the Export Clause. Congress provided for severability in the event provisions of the WRDA were held invalid. Congress did not provide language in the WRDA demonstrating its intent to have the entire HMT severed from the WRDA in the event a portion of the HMT was held unconstitutional. The legislative history, while it indicates Congress was aware of the possibility of the tax on exports being invalid, is far from clear as to Congress' intention should the tax on exports be so declared. Hence there is not evidence in the language, structure, or legislative history strong enough to overcome the presumption in favor of severability that attaches when Congress includes a severability clause in a statute. The Court therefore is unable to conclude that Congress would not have enacted the HMT absent the tax on exports.

CONCLUSION

Upon review of all of the papers filed in this case, the Court finds that the issue of severability is solely an issue of law which properly may be decided by summary judgment. The Court holds, as a matter of law, that those portions of the HMT that apply to exports, and are thus unconstitutional in accordance with this Court's opinion in *U.S. Shoe*, *i.e.*, 26 U.S.C. §§ 4461(c)(1)(B) and 4461(c)(2)(A), are severable from the remainder of the HMT, in particular those portions of the statute that involve Plaintiffs' operations as shippers providing passenger services. Accordingly, it is hereby ORDERED that Plaintiffs' motion for summary judgment on Count IV of their second amended complaint is denied, it is further ORDERED that Defendant respond to Plaintiffs' motion for partial summary judgment within 60 days of the date of this order.

The Court, in *U.S. Shoe*, held that the HMT is unconstitutional with respect to exports. This Court now holds that the invalid export provisions of the HMT are severable from the valid portions. The issue of constitutionality is currently on appeal, as previously discussed. The Court believes that both the issue of constitutionality and the issue of severability are threshold issues which ultimately should be resolved prior to addressing the remaining issues in this case. Furthermore, while the Court concludes that the language, structure, and history of the WRDA demonstrates an intent to sever invalid from valid portions

of the HMT, the legislative history of the WRDA also reflects Congress' concern over validity of the tax on exports, as well as its struggle over the proper basis to tax port use. Therefore, pursuant to 28 U.S.C. § 1292(d)(1), the Court finds that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/48 6/3/96 Musgrave, J.	Horizon Air Industries, Inc.	94–02–00099	8411.12.40 5% 8411.91.90 3.7%	C9411.12.40, C9411.91.90	Agreed statement of facts	Portland Turbo-jet engines and parts thereof
C96/49 6/4/96 Goldberg, J.	Ford Motor Company, Inc.	94–06–00346	8708.29.00 3.1%	7007.11.00 Duty free	Agreed statement of facts	Laredo Automotive backlites incorporating heating elements
C96/50 6/6/96 Carman, J.	Heraeus Amersil, Inc.	90–07–00367	7014.00.20 10%	7020.00.00 6.6% 7002.20.10 4.7%	Agreed statement of facts	New York (JFK) fused quartz or fused silica
C96/51 6/6/96 Musgrave, J.	Turbon Products, Inc.	92–05–00363	3923.40.00 5.3% 3296.90.83 5.3%	8473.10.00 4% 8473.29.00 3.9% 8473.30.40 Duty free 8483.40.50 2.5%	Agreed statement of facts	Harrisburg Cartridges, and parts thereof
C96/52 6/6/96 Musgrave, J.	Turbon Products, Inc.	92–09–00592	3923.40.00 5.3% 3926.90.83 5.3%	8473.10.00 4% 8473.29.00 3.9% 8473.30.40 Duty free 8483.40.50 2.5%	Agreed statement of facts	Harrisburg Cartridges, and parts thereof
C96/53 6/6/96 Musgrave, J.	Turbon Products, Inc.	93–02–00076	3923.40.00 5.3% 3926.90.83 5.3%	8473.10.00 4% 8473.29.00 3.9% 8473.30.40 Duty free 8483.40.50 2.5%	Agreed statement of facts	Harrisburg Cartridges, and parts thereof

ABSTRACTED CLASSIFICATION DECISIONS—*Continued*

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/54 6/6/96 Musgrave, J.	Turbon Products, Inc.	93–08–00432	3923.40.00 5.3% 3926.90.83 5.3%	8473.10.00 4% 8473.29.00 3.9% 8473.30.40 Duty free 8483.40.50 2.5%	Agreed statement of facts	Harrisburg Cartridges, and parts thereof
C96/55 6/6/96 Musgrave, J.	Turbon Products, Inc.	94–01–00055	3923.40.00 5.3% 3926.90.83 5.3%	8473.10.00 4% 8473.29.00 3.9% 8473.30.40 Duty free 8483.40.50 2.5%	Agreed statement of facts	Harrisburg Cartridges, and parts thereof

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